Supreme Court of the United States.

OCTOBER TERM, 1897.

THE UNITED STATES OF AMERICA,

Appellant,

vs.

WONG KIM ARK,

Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF OF THE APPELLEE.

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Statement.

Wong Kim Ark, the petitioner below, was born in 1873 in the City of San Francisco, California, of Chinese parents. In 1890 he left this country for the first time and went on a temporary visit to China with his parents. In the same year he returned to the United States, and was, without question, permitted to land. He remained in the United States until 1894, when he made another temporary visit to China, and returned to this country in August of the following year on the steamer "Coptic" o. the

Occidental and Oriental Line. Upon his arrival in the United States he made application to the Collector of Customs at the port of San Francisco for permission to land. This application was denied on the ground that he was a Chinese laborer, debarred by law from entering this country, and was not, as he claimed, a citizen of the United States. He then applied to the United States District Court for the Northern District of California for a writ of *habeas corpus*, alleging in his petition that he was a citizen of the United States, and was restrained of his liberty, without due process of law, by the Collector of Customs of the Port of San Francisco, and by the General Manager of the Occidental and Oriental Steamship Company, acting under the direction of said Collector of Customs. Upon the return of the writ of *habeas corpus* the petitioner was discharged, the Court below being of opinion that he was a citizen of the United States, and therefore improperly restrained of his liberty. From this judgment the Government has appealed.

The case below was heard upon an agreed statement of facts, which will be found at pages 10 and 11 of the record, and is as follows:

I.

That the said Wong Kim Ark was born in the year 1873 at No. 751 Sacramento street, in the City and County of San Francisco, State of California, United States of America, and that his mother and father were persons of Chinese descent, and subjects of the Emperor of China, and that said Wong Kim Ark was and is a laborer.

II.

That at the time of his said birth his mother and father were domiciled residents of the United States, and had established and enjoyed a permanent domicile

and residence therein at said City and County of San Francisco, State aforesaid.

III.

That said mother and father of said Wong Kim Ark continued to reside and remain in the United States until the year 1890, when they departed for China.

IV.

That during all the time of their said residence in the United States as domiciled residents therein, the said mother and father of said Wong Kim Ark were engaged in the prosecution of business, and were never engaged in any diplomatic or official capacity under the Emperor of China.

V.

That ever since the birth of said Wong Kim Ark, at the time and place hereinbefore stated and stipulated, he has had but one residence, to wit, a residence in said State of California, in the United States of America, and that he has never changed or lost said residence or gained or acquired another residence, and there resided claiming to be a citizen of the United States.

VI.

That in the year 1890 the said Wong Kim Ark departed for China upon a temporary visit and with the intention of returning to the United States, and did return thereto on the 26th day of July, 1890, on the steamship "Gaelic," and was permitted to enter the United States by the Collector of Customs upon the sole ground that he was a native-born citizen of the United States.

VII.

That after his said return the said Wong Kim Ark remained in the United States, claiming to be a citizen thereof, until the year 1894, when he again departed for China, upon a temporary visit, and with the intention of returning to the United States, and did return thereto in the month of August, 1895, and applied to the Collector of Customs to be permitted to land, and that such application was denied upon the sole ground that said Wong Kim Ark was not a citizen of the United States.

VIII.

That said Wong Kim Ark has not, either by himself or his parents, acting for him, ever renounced his allegiance to the United States, and that he has never done or committed any act or thing to exclude him therefrom.

Argument.

The single question presented upon this appeal is this: Are the children born in this country of alien residents not connected with the diplomatic service citizens of the United States?

It is a mere chance that the petitioner below was a Chinaman, and that fact has not, so far as we can conceive, any bearing upon the case at bar. Whether Wong Kim Ark shall be permitted to land in this country, or what the rights of the Chinese race may be, is of little importance. The case, as we understand it, which is before this Court for decision, is much larger and broader, and the question now up for discussion is whether the children born in this country to any alien resident are citizens of the United States, without regard to the country from which their parents

came, and irrespective of whether they are of English, Irish, French, German or any other extraction?

As the District Court said in its opinion (Record, p. 15):

> "If the contention of counsel for the Government be correct, it will inevitably result that thousands of persons of both sexes, who have been heretofore considered as citizens of the United States, and have always been treated as such, will be, to all intents and purposes, denationalized, and remanded to a state of alienage. Included among these are thousands of voters who are exercising the right of suffrage as American citizens, and whose right as such is not, and never has been, questioned, because birth within the country seems to have been recognized generally as conclusive upon the question of citizenship."

The Fourteenth Amendment of the Constitution of the United States, so far as it is of interest in this case, is as follows:

"All persons born * * * in the United States and subject to the jurisdiction thereof are citizens of the United States."

The petitioner, Wong Kim Ark, apparently conforms to the requirements of this amendment. The argument of the Government is, however, that his parents were subjects of the Emperor of China, and that, therefore, he was not at the time of his birth "subject to the jurisdiction" of the United States, and that in consequence Wong Kim Ark cannot be a citizen, it being necessary, before a person can be a citizen of the United States by birth, that, at the time of, and coincident with, his birth, he should be "subject to the jurisdiction thereof."

The decision of this question would, therefore, seem to turn upon the meaning of the words "subject to the jurisdiction thereof" as used in the Fourteenth Amendment to the Constitution.

Briefs of the Government.

Before proceeding to any independent discussion of this subject it will perhaps be useful to refer to the main points upon which the Government relies in support of its contention that Wong Kim Ark was not at the time of his birth "subject to the jurisdiction" of the United States.

It is substantially conceded that the Fourteenth Amendment is but declaratory of the law as it previously existed, and it is practically admitted that, since the adoption of the Fourteenth Amendment, every judicial decision directly upon the question in controversy has been adverse to the Government's present position.

It is, however, urged most earnestly by the Solicitor General and by Mr. Collins, the *amicus curiæ*, that this long-standing interpretation of who was a citizen of the United States is wrong, and has been wrong from the very beginning, in that the Courts have resorted to the common law to aid them in their decisions, while the question was really one of the law of nations. Further than that, the Government seriously presses the point that there is no common law in the United States, and that, therefore, in ascertaining the meaning of words used in the Constitution, but not there defined, it is not permissible to inquire how they were commonly understood by lawyers at the time of the adoption of the Constitution, or in other words what their meaning was at common law.

The two fundamental theories, therefore, now advanced by the Government, and upon which its entire argument stands or falls, are:

First. That there is no common law in the United States.

Second. That the question of citizenship in a nation is to be determined by the rules of international law.

(*a*) Perhaps we do not fully understand the argument of the Government that there is no common law in the United States, but as we read the authorities which have been cited by the Solicitor-General, this Court has simply held that "there are no common law offenses against the United States" (United States vs. Britton, 108 U. S., 199–206).

This proposition is too well established to admit of dispute, but it is not clear how it can affect the present discussion. The question whether a man is "subject to the jurisdiction" of the United States is not, we take it, to be determined by the common law, but by the principles of the common law, which is a very different matter.

In other words, it has often been decided by this Court that, in determining the meaning of the words used in the Constitution and the statutes of the United States and not therein defined, it is both proper and necessary to seek in the common law, as the source and origin of our jurisprudence, their true definition; and the question fairly raised here is not whether there is a common law in the United States, but whether it is admissible, in construing and defining words used in the Constitution, to refer to the common law.

The case of Smith vs. Alabama, 124 U. S., 465, is referred to upon the brief of the Solicitor General in support of the proposition that there is no common law in the United States.

If the counsel for the Government had read this case through he would have found on page 478 the following statement:

> "There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law and are to be read in the light of its history. The code of

> constitutional and statutory construction which therefore is gradually formed by the judgments of this Court in the application of the Constitution and the laws and treaties made in pursuance thereof, has for its basis, so much of the common law as may be implied in the subject and constitutes a common law resting on national authority."

In Moore vs. The United States, 91 U. S., 270, the question before the Court was as to what rule of law should determine the admissibility of evidence in the Court of Claims. This Court said, page 273 :

> " By what law is the Court of Claims to be governed in this respect? May it adopt its own rules of evidence? or is it to be governed by some system of law? In our opinion it must be governed by law, and we know of no system of law by which it should be governed other than the common law. *That is the system from which our judicial ideas and legal definitions are derived. The language of the Constitution and of many Acts of Congress could not be understood without reference to the common law.*"

It was said in Minor vs. Happersett, 21 Wallace, 162–167 :

> " The Constitution does not in words say who shall be natural-born citizens. Resort must be had elsewhere to ascertain that. At common law, with the nomenclature of which the framers of the Constitution were familiar, it was never doubted that all children born in a country of parents who were its citizens, became themselves upon their birth citizens also."

In Gardner vs. Ward, 2 Mass. Rep., 244, the question was as to the right of the plaintiff to vote. As

the Court said in its opinion "this question * * * depends altogether upon this inquiry—whether H. Gardner was, at that time, *a citizen of the United States* or an alien."

This case was decided in 1805. Theophilus Parsons appeared for the plaintiff. Mr. Dane for the defendant. Mr. Dane was unsuccessful, and in the similar case of Kilham vs. Ward, 2 Mass., 236, he had Story as counsel. He was again unsuccessful. There is no doubt but that the cases were well presented in behalf of the defendants, yet it was held that the question of citizenship of the United States was to be decided by the principles of the common law. The Court said at page 245:

> "*In determining this question we are to be governed altogether by the principles of the common law*, 'and from whatever source these may have been derived and in whatever form expressed, the substantial part of them is founded in reason and in nature of government.'
>
> "I take it, then, to be established, with a few exceptions, not requiring our present notice, that a man born within the jurisdiction of the common law is a citizen of the country wherein he is born. By this circumstance of his birth, he is subjected to the duty of allegiance which is claimed and enforced by the sovereign of his native land, and becomes reciprocally entitled to the protection of that sovereign and to the other rights and advantages, which are included in the term 'citizenship.'"

In the case of Ainslie vs. Martin, 9 Mass., 454, 456 Chief-Justice PARSONS said:

> "Our statutes recognize alienage and its effects, but have not defined it. *We must, therefore, look to the common law for its definition.* By this law, to make a man an alien, he must be

born without the allegiance of the commonwealth."

If it is permissible to look to the common law for the definition of "alienage" when used in a statute, it would seem to follow that it was equally permissible to look to the common law for the definition of "citizen" when used in the Constitution, and we submit that it is of little importance in the case at bar whether there is or is not a common law in the United States, so long as the proposition asserted in the foregoing authorities is sound, that resort can be had to the common law for the meaning of words found but not defined in the Constitution.

(*b*) The second theory of the appellant is that the question of citizenship in the United States is to be determined by the law of nations and not by the law of the United States.

We should have supposed it difficult to find a question more widely separated from the domain of international law than the status of a citizen in any country. It would seem as if the right of citizenship was for each country to determine for itself, and that any nation would guard with jealous interest the right to decide who should be its members. That is to say, it is a matter of local and national law, as distinguished from international law, and the United States would be the last to surrender the privilege of determining, by its own law, who were or were not its citizens.

> "The answer to the question, Who is a citizen? is different in different States, and depends on the laws and constitution of each." (Aristotle, Politics, Book III., c. s. 2 and 3.)

This proposition of the government has, we think, arisen from a mistaken notion as to the true character of the question in this case, and it seems somewhat re-

markable that the Solicitor-General should take the position that the Government of the United States is to be administered, not in accordance with the laws of the United States, but in accordance with the law of nations, and that the vital question of who compose the great body of their citizens is to be determined, not by the law of the United States, but by the rules of international law.

In the case of Scott vs. Sandford, 19 How., 393, 451, Chief-Justice TANEY used the following language:

> "But in considering the question before us, it must be borne in mind that there is no law of nations standing between the people of the United States and their Government, and interfering with their relation to each other. The powers of the Government and the rights of the citizen under it, are positive and practical regulations plainly written down. * * * And no laws or usages of other nations, or reasoning of statesmen or jurists * * * can enlarge the powers of the Government or take from the citizens the rights they have reserved."

Mr. Justice STORY, in Inglis vs. Trustees of the Sailors' Snug Harbor, 3 Pet., 99, 162, when speaking upon the question of citizenship, said:

> "The ground of this doctrine is that each Government had a right to decide for itself who should be admitted or deemed citizens."

Mr. Stanbery, then Attorney-General, said in Warren's Case, 12 Opin. Atty.-Gen., 319, 325:

> "A question as to status or citizenship, if it arose in the United States, would be determined by our own law."

The question in Warren's case was, whether a man born in Ireland, but naturalized as a citizen of the

United States, was entitled, when arraigned in a British court for the offense of treason felony, to the privilege of a jury *de mediatate*, which would have been a jury composed half of British subjects and half of aliens from Great Britain born in the United States. This right was given by the British law only to an alien. The English Court, when Warren filed his plea demanding the privilege of a jury *de mediatate*, decided that Warren was a citizen and subject of Great Britain by reason of his birth, and that he could not become an alien by expatriation or abjuration of his allegiance, or by being clothed with a new allegiance in a foreign country. This decision was acquiesced in by Mr. Stanbery, for the reason given by him that a question of citizenship must be determined by the law of the country in which the question is raised and not by international law, or, as he said at page 325: "*I have no hesitation in saying that we have here only a question of British law, and that Warren's condition as to alienage or citizenship for the purposes of this case is to be fixed by that law alone.*"

If it is possible for a man to be a citizen of a country by the law of that country, and a citizen of another country by the rules of international law, then the question which doctrine shall prevail is to be determined according to the manner in which it arises for decision, whether as an international question or simply as a local and national matter.

To put the idea sought to be conveyed in another form, if there is any conflict between the law of any country and international law, "the law of nations, as to particular matters, may be, as to such particular countries, either expanded or contracted by local legislation" (Greisser Case, 2 Whart. Int. Dig., 399).

As was said in the case of Lynch vs. Clarke, 1 Sand. Ch., 583, 660, in determining who was a citizen of this country.

> "In reference to the argument that the United States should establish a rule on proper prin-

> ciples, and which shall be just to other nations, it may be said that this is purely a matter of municipal regulation, in every country."

Lord Justice BRETT, in Niboyet vs. Niboyet, L. R., 4 Pr. Div., 1, 12, said.

> "By the universal independence of nations, each binds by its personal laws its natural born subjects and all who may become its subjects."

It is not at all certain that this principle of International Law, as it is called, which is supposed to declare that a child born to aliens while residing in a foreign country takes the nationality of his father, is anything more than a name. As a matter of fact, no nation, so far as we have been able to ascertain, decides or pretends to decide the status of its citizens by any other law than its own.

It is true that different nations have different laws upon this subject, and the laws of some of these nations are more or less in accord, but there is no great unanimity among them.

England now holds to the rule that birth within its dominions makes a man a subject of the Queen, unless, if born of aliens, he elects the nationality of his parents (33 Vict., Chap. 14).

In France a similar doctrine prevails, and is as follows :

> " The French law considers all children of foreigners born in France as French citizens, unless before coming of age they decline French citizenship. * * * Otherwise they are amenable to obligatory military service and punishment as deserters if they endeavor to evade it " (49 Alb. L. J., 20).

In Denmark, Portugal and Holland the law is appa-

rently the same as that of France, as Lord Cockburn in his work on Nationality says, at pages 14 and 15, that birth within their dominions confers citizenship on the offspring of alien parents, subject to the right of the individual concerned to reject it at majority.

Another rule is adopted by Belgium, Spain, Italy, Greece, the Grand Duchy of Baden, Russia, Russia-Poland and the Ottoman Empire, where birth within their dominions confers citizenship on the offspring of alien parents on the right being claimed on certain specified conditions (Cockburn on Nationality, 14 and 15).

It is clear, therefore, that each country has enacted its own law as to who is or who is not its citizen, and has never fallen back upon any principle of international law for the decision of the question.

All that can possibly be argued from the state of the law of citizenship in the different countries of Europe is that it might be advisable for the people of the United States to pass a law or amend their constitution, if they saw fit, so as to conform with the laws of the majority of these countries, but we fail to see how the counsel for the government have shown that the status of a citizen was or ever can be determined in the Courts of a country by the law of nations or by any other law than its own. In other words, the question before this Court is not what is the proper policy for the United States to adopt, but what is the meaning of an amendment of their constitution, and the constitution must be interpreted, as we think, by the light of the principles of our own law and not by the law of other countries or the law of nations. "*The laws of the United States determine what persons shall be regarded as citizens, irrespective of such persons' pleasure or the laws or pleasure of any other government*" (State vs. Adams, 45 Iowa, 99, 101).

(*c*) It is conceded by the Government that this Court has never decided the question which arises upon this

appeal, but it is claimed by the Solicitor-General that the two decisions of Elk vs. Wilkins, 112 U. S., 94, and The Slaughter-House Cases, 16 Wall., 36, indicate that in the judgment of this Court a child born in the United States to alien parents is not a citizen thereof.

In the briefs of the appellant the greatest reliance seems to be placed upon the case of Elk vs. Wilkins (*supra*), in which it was held that the words of the Fourteenth Amendment, "subject to the jurisdiction thereof," referred to the time of the birth of the alleged citizen, and that if he was born a member of a distinct political community, although born within the limits of the United States, he could not be considered as born subject to the jurisdiction of the United States within the meaning of the Fourteenth Amendment. This Court therefore decided that John Elk, having been born of Indian parents, who had not abandoned their tribal relations, was at his birth a member of a distinct political community, and not then subject to the jurisdiction of the United States, and was therefore not a native-born citizen of this country and could only become a citizen thereof by naturalization.

This decision, as we understand it, simply emphasized the doctrine, long recognized in this country, that the Indians were and always had been independent nations. They were, it is true, within the geographical limits of the United States, but the different Indian Governments were considered as a nation or nations within a nation, and "were regarded and treated as foreign governments, as much so as if an ocean had separated the red man from the white" (Scott vs. Sanford, 19 How., 393, 404).

By the Eighth Section of the First Article of the Constitution it was provided that "Congress shall have power * * * to regulate commerce with foreign nations, and among the several States *and with the Indian tribes.*"

In the early case of Goodell vs. Jackson, 20 Johnson's Reports, 693, 712, it is said:

> "Though born within our territorial limits, the Indians are considered as born under the dominion of their tribes. They are not our subjects, born within the purview of the law, because they are not born in obedience to us. They belong, by birth, to their own tribes, and these tribes are placed under our protection and dependent upon us; but still we recognize them as national communities."

In other words, the Elk case simply decided that an Indian, who himself voluntarily abandoned his tribal relations and became a member of the general body of the inhabitants of this country, occupied the same position as any other emigrant or alien, and could not insist that he had any other or greater rights because his place of birth was geographically within the limits of the United States. As Chief Justice TANEY said: "If an individual should leave his nation or tribe and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people" (Scott vs. Sanford, 19 How., 393, 404).

The Elk case is in no way similar to the case at bar, and would seem to have little bearing upon the question of whether an alien's children born in the United States are citizens thereof. The Indian Elk was not in the position of Wong Kim Ark, but of Wong Kim Ark's father. They were both alien residents of this country.

A parallel situation to that of the appellee would have been the question of the citizenship of any children which might have been born to Elk after he had abandoned his tribe and become an alien resident of the United States.

No such question is directly decided by the Supreme Court in Elk vs. Wilkins, but in the opinion of Mr. Justice GRAY the case of United States vs. Elm, 23 Int. Rev. Rec., 419, was referred to with apparent approval.

In this latter case, which was decided by Judge

WALLACE, Circuit Judge of the Northern District of New York, the Indian, Elm, occupied the same position which children born to Elk after he had left his tribe would have held, and which Wong Kim Ark now holds, and it was decided that he was a citizen of the United States by reason of his birth.

The opinion of the Court in U. S. vs. Elm was in part as follows :

> " It is not enough to confer citizenship on the defendant that he was born in the United States, it must also appear that he was ' subject to the jurisdiction thereof ' within the meaning of the Fourteenth Amendment.
>
> " In a general sense, every person born in the United States is within the jurisdiction thereof while he remains in the country. *Aliens, while residing here, owe a local allegiance, and are equally bound with citizens to obey all general laws for the maintenance of peace and order which do not relate specially to our own citizens, and they are amenable to the ordinary tribunals of the country.*"

Judge WALLACE then enumerates the classes of people in the United States who are not " subject to the jurisdiction thereof " and refers to the children of ambassadors and to Indians who maintain their tribal relations and are therefore regarded as " distinct political communities." He afterwards goes on as follows :

> " If defendant's tribe continued to maintain its tribal integrity and he continued to recognize his tribal relations, his status as a citizen would not be affected by the Fourteenth Amendment ; but such is not his case. His tribe has ceased to maintain its tribal integrity, and he has abandoned his tribal relations, as will hereafter

> appear, and because of these facts * * * he is a citizen within the meaning of the Fourteenth Amendment."

The only reasonable interpretation of Elk vs. Wilkins *(supra)* is that it decided one question only, viz: that a man born to parents, who were members of an Indian tribe at the time of his birth, was not at his birth "subject to the jurisdiction" of the United States, and was not therefore by reason of such birth a citizen thereof. This decision goes no further. If any other inference or conclusion could properly be drawn from this case, it would be that this Court, by its approval of United States vs. Elm, indicated that John Elk's children, born after he had left his tribe, and John Elk himself, if he had been born subsequent to the abandonment of their tribal relations by his parents, would have been citizens of the United States.

We therefore submit that Elk vs. Wilkins *(supra)* is no authority either for or against the proposition that a man born in the United States to alien parents resident therein is a citizen thereof.

There is nothing in the decision itself of the Slaughter House Cases, 16 Wall., 36, which would tend to show that this Court had in mind the question now before it, except the following statement (p. 73), made without any previous argument or reference to any authority:

> "The phrase 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls and citizens or subjects of foreign states born within the United States."

These words were *obiter dicta*, and whatever force or value they may have, in the opinion of the counsel for the Government, is certainly weakened by the fact that Mr. Justice MILLER, in the very next paragraph (p. 74), said:

> "Not only may a man be a citizen of the United States without being a citizen of a State, but an important element is necessary to convert the former into the latter. He must reside within the State to make him a citizen of it, *but it is only necessary that he should be born * * * in the United States to be a citizen of the Union.*"

This Court did not seem to think that what was said in the Slaughter House cases was to be considered as in any way a decision upon the present question, for in the subsequent case of Minor vs. Happersett, 21 Wall., 162–167, the Court speaking by Chief Justice WAITE declined to express an opinion upon the precise question involved in this case and said:

> "Some authorities go further and include as citizens children born within the jurisdiction without reference to the citizenship of their parents; as to this class there had been doubts, but never as to the first. For the purposes of this case it is not necessary to solve these doubts. It is sufficient for everything we have now to consider that all children born of citizen parents within the jurisdiction, are themselves citizens."

The examination of these cases of Elk vs. Wilkins and the Slaughter House Cases would seem to show that this Court has never considered whether birth in the United States of alien parents resident therein makes a man a citizen thereof, and to assist the Court in arriving at any conclusion upon this question it will be necessary to resort to some other source than its own decisions.

POINT I.

Wong Kim Ark at the time of his birth was "subject to the jurisdiction" of the United States within the meaning of the words as used in the Fourteenth Amendment to the Constitution.

In considering this question it will not be without advantage to see at the outset just what the situation of the father of Wong Kim Ark was in this country at the time his son was born and what his relations were to this government.

He was, as appears by the agreed statement of facts, a subject of the Emperor of China, having a "permanent domicile and residence" in California, and the first inquiry which suggests itself is whether his position is in any way different from that of other aliens residing in the United States.

Prior to the passage of the Act of Parliament of 33 Vict., Ch. 14, a person born a British subject was not permitted to throw off or in any way escape from his allegiance to the crown. Once a subject of the King of Great Britain, he was always a British subject.

As was said by Mr. Stanbery in Warren's Case, 10 Opin. Atty. Gen., 319, 322:

> "According to English law, perfectly well established, a native-born citizen of Great Britain does not become an alien by expatriation or abjuration of his allegiance, or by being clothed with a new allegiance in a foreign country."

In Cockburn on Nationality, at page 63, will be found the following:

> "At variance in this respect with the laws of all other civilized nations, the law of England

> * * * asserts, as an inflexible rule, that no British subject can put off his country or the natural allegiance which he owes to the Sovereign—even with the assent of the Sovereign; in short, that natural allegiance cannot be got rid of by anything less than an Act of the Legislature, of which it is believed no instance has occurred."

In Deck vs. Deck, 2 Sw. & Tr., 90, the question was as to the Court's jurisdiction over a matrimonial cause in which the plaintiff was an English woman, and the defendant a natural-born English subject, domiciled in the United States. The Court pronounced for the jurisdiction upon the ground that the defendant, "being a natural-born English subject, could not shake off his liability to the authority of the laws of his native country" (Syllabus).

The subject of Great Britain, therefore, who became a permanent resident of the United States was not permitted by the country of his birth to become the subject of any other nation. Was it, however, ever doubted that, though he failed to become naturalized, his children born to him here, were born within the jurisdiction of the United States? Did it ever occur to any one that a child so born was considered by this Government as born within the jurisdiction of Great Britain and a subject of the Queen?

The Courts of Great Britain have never so held. An application was made in the case of *In re* Bourgoise, 41 Ch. Div., 310, for the appointment of a guardian of two infant children. It appeared that the father of the children, a Frenchman, had been naturalized in England and was there married to an Englishwoman. He afterwards returned to France, and the children in question were born there. The application was denied for the reason that, among other things, the petitioners were French subjects by the mere fact of their birth. Lord Justice COTTON said, at page 319:

> "They were the children of an Englishwoman who married a Frenchman who obtained naturalization here; but they were born abroad, and *prima facie*, according to the laws of England, and I suppose according to the law of all civilized countries, that makes them subjects of the French State. If they had been born in England they would, without any act of Parliament, have been subjects of the English Crown."

It has been held by this Court in Yick Wo vs. Hopkins, 118 U. S., 356, that the Chinese race is within the protection of the Fourteenth Amendment to the Constitution, and that Chinamen are entitled to the equal protection of the laws of every State. If one portion of this Fourteenth Amendment includes within its scope and meaning the Chinese race, it is not clear why the same people do not come within the terms of another portion of the same amendment.

The father of Wong Kim Ark had an unquestionable right to the protection of the laws of this country as against the citizens or other inhabitants thereof, but, further than that, he had a right to invoke the aid of this nation against the Emperor of China, whose subject he was by birth. This is the doctrine of this Court, which has said:

> "By the law of nations, doubtless, aliens residing in a country with the intention of making it a permanent place of abode acquire, in one sense, a domicile there; and, while they are permitted by the nation to retain such a residence and domicile, are subject to its laws, *and may invoke its protection against other nations*" (Chinese Cases, 149 U. S., 698–724).

In return for this protection the father of Wong Kim Ark owed allegiance to the United States—that is to say, he owed obedience to them, and the only obedience possible in a republic is obedience to its laws.

The father of the appellee being subject to the jurisdiction of the United States in the sense that he could invoke their protection against the country of his origin and owed obedience to their laws, it is not clear what further could be meant by these words, and it would seem that Wong Kim Ark's father was, while in the United States, subject to their jurisdiction.

In Radich vs. Hutchins, 95 U. S., 210, the plaintiff was an alien resident in the Southern States at the time of the war and a subject of the Emperor of Russia. He brought an action to recover certain money and property which had been paid by him to the Confederate Government for the privilege of exporting certain cotton. The defendant demurred, and the demurrer was sustained. Upon appeal to this Court the judgment below was affirmed upon the ground that the transaction was "fatally tainted," inasmuch as the plaintiff had assisted the Southern States "in their war against the Government and authority of the United States." Upon the question of the allegiance of a resident alien, the Court said at page 211 :

> "If at the time the transaction took place which has given rise to the present action the plaintiff was a subject of the Emperor of Russia, as he alleges, that fact cannot affect the decision of the case, or any question presented for our consideration. He was then a resident of the State of Texas, and engaged in business there. As a foreigner domiciled in the country, he was bound to obey all the laws of the United States not immediately relating to citizenship, and was equally amenable with citizens to the penalties prescribed for their infraction. He owed allegiance to the government of the country so long as he resided within its limits, and can claim no exemption from the statutes passed to punish treason, or the giving of aid and comfort to the insurgent States."

In Carlisle vs. United States, 16 Wall., 147, it was decided that British subjects resident in the Southern States during the War of the Rebellion owed allegiance to the United States and were subject to prosecution for violation of the laws of the United States against treason and for giving aid and comfort to the rebellion. This Court, in its opinion, discusses at length what is meant by "allegiance," and says at page 154:

> "The claimants were residents in the United States prior to the commencement of the rebellion. They so allege in their petition; they were, therefore, bound to obey all the laws of the country, not immediately relating to citizenship, during their sojourn in it; and they were equally amenable with citizens for any infraction of those laws. 'The rights of sovereignty,' says Wildman in his Institutes on International Law, 'extend to all persons and things not privileged that are within the territory. They extend to all strangers therein, not only to those who are naturalized and to those who are domiciled therein, having taken up their abode with the intention of permanent residence, but also to those whose residence is transitory. All strangers are under the protection of the sovereign while they are within his territories, and owe a temporary allegiance in return for that protection.'
>
> "By allegiance is meant the obligation of fidelity and obedience which the individual owes to the government under which he lives, or to his sovereign in return for the protection he receives. It may be an absolute and permanent obligation, or it may be a qualified and temporary one. The citizen or subject owes an absolute and permanent allegiance to his government or sovereign, or at least until, by some open and and distinct act, he renounces it and becomes a

citizen or subject of another government or another sovereign. The alien, whilst domiciled in the country, owes a local and temporary allegiance, which continues during the period of his residence.

"This obligation of temporary allegiance by an alien resident in a friendly country is everywhere recognized by publicists and statesmen. In the case of Thrasher, a citizen of the United States resident in Cuba, who complained of injuries suffered from the government of that island, Mr. Webster, then Secretary of State, made, in 1851, a report to the President in answer to a resolution of the House of Representatives, in which he said: 'Every foreigner born residing in a country owes to that country allegiance and obedience to its laws so long as he remains in it as a duty upon him by the mere fact of his residence, and that temporary protection which he enjoys, and is as much bound to obey its laws as native subjects or citizens. This is the universal understanding in all civilized states, and nowhere a more established doctrine than in this country.' And again: 'Independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance or of renouncing any former allegiance, it is well know that, by the public law, an alien or a stranger born, for so long a time as he continues within the dominions of a foreign government, owes obedience to the laws of that government, and may be *punished for treason* or other crimes as a native-born subject might be, unless his case is varied by some treaty stipulation.'"

In Hall's International Law, page 204, is the following:

> "During the civil war in the United States the British Government showed itself willing that foreign countries should assume to themselves a very liberal measure of rights in this direction over its subjects. Lord Lyons was instructed 'that there is no rule or principle of international law which prohibits the government of any country from requiring aliens, resident within its territories, to serve in the militia or police of the country, or to contribute to the support of such establishments'; and, though objection was afterwards taken to English subjects being compelled 'to serve in the armies in a civil war, where, besides the ordinary incidents of battle, they might be exposed to be treated as rebels and traitors in a quarrel in which, as aliens, they would have no concern,' it was at the same time said that the Government 'might well be content to leave British subjects voluntarily domiciled in a foreign country, liable to all the obligations ordinarily incident to such foreign domicile, including, when imposed by the municipal law of such country, service in the Militia or National Guard or local police, for the maintenance of internal peace and order, or even, to a limited extent, for the defense of the territory from foreign invasion.'"

Whether Wong Kim Ark was himself at the time of his birth subject to the jurisdiction of the United States does not depend upon whether his father was or not, but we take it that it is of some importance in this case that the father of Wong Kim Ark was, at the time his son was born, subject to the jurisdiction of the United

States within any plain construction of these words, and under the authorities cited could have been tried for treason or drafted into the armies of the United States to defend the country from a foreign invasion. He certainly was not a member of any nation which was within the limits of the United States, and he was not subject to any other political jurisdiction.

This Government has recognized the Indian tribes as independent political communities, because they were the original inhabitants of the country, but it has never extended this doctrine so far as to say that a foreign country may establish within our borders an independent political community. If the doctrine advanced by the Solicitor-General should prevail, then we should have independent Chinese, English and German kingdoms within our boundaries, and the children born in these communities would remain English, German or Chinese subjects, incapable even of naturalization, as our law stands to-day. The Monroe Doctrine has received the most vigorous support of this Government since it was first advanced, but would seem to be entirely nullified by the doctrine the Solicitor-General now asks this Court to declare to be the law of the United States. If independent political communities can be established by foreign nations within our own country itself, it would hardly seem worth while to pay attention to the establishment of any such community in South or Central America.

We think the counsel for the Government have been misled by the decision of the Court in Elk vs. Wilkins, 112 U. S., where it was said that the words "subject to the jurisdiction" of the United States meant "subject to the political jurisdiction thereof." All that was then intended was that the Indians were independent nations, and that any tribe of Indians was as distinct a political community as England, and that the political jurisdiction over the Indians, so long as they held to their tribal relation, was in their own nation, just as

England had jurisdiction over the people of Great Britain. They were considered a nation within a nation. It can hardly, however, be seriously argued that each unnaturalized Englishman, Scotchman or Frenchman in this country is, while he remains here, within the political jurisdiction of England or France.

Political jurisdiction of a nation is exercised within its own boundaries, and is not tolerated within the dominions of another country. Each nation must take care of the people who live in it, and cannot for a moment recognize the right of another nation to exercise a political jurisdiction within its limits. The position of the Indians is special, and the reasons for it have been previously stated.

Putting aside the question of whether the father of Wong Kim Ark was "subject to the jurisdiction" of the United States while he resided here, we then come to the independent consideration of the status of the appellee himself. His father may or may not have been subject to the jurisdiction of this country, although we think we have shown that he was, but the question of the citizenship of Wong Kim Ark rests on an entirely different basis. A man cannot inherit his citizenship from his father as he does his property. It is something between himself and the country of his birth, and in no way connected with the relations of the family as distinct from the State. As Mr. Bates, then Attorney-General, said in 10 Opin. of Atty.-Gen., 382, 399: "It is an error to suppose that citizenship is ever hereditary. It never 'passes by descent.' It is as original in the child as it was in his parents. It is always either born with him or given to him directly by law."

In McKay vs. Campbell, 2 Sawy., 118, the syllabus is as follows:

> "By the common law a child born within the allegiance of the United States is born a subject

thereof, without reference to the political status or condition of its parents."

It is admitted that Wong Kim Ark was born in the United States, and has lived here ever since. The only question is whether he comes within the second condition of perfect citizenship required by the Fourteenth Amendment, and was "subject to the jurisdiction" of the United States at his birth.

As was said in Jones vs. McMasters, 20 How., 8, 20, *mutatis mutandis* (the italicised words alone are our own):

> "The *appellee* was born under the dominion of the *American* Republic, and has lived under it ever since *his* birth, and beyond all question, therefore, is a citizen of that Government owing it allegiance, which has never been interrupted or changed."

At the time of his birth Wong Kim Ark was entitled to the protection of the United States, and in return owed to them allegiance. The difficulty is perhaps with the meaning of the word "allegiance," but it is certainly not easy in a Republic to give it any other meaning than obedience to the laws of the Republic, which are the expressed will of the people, who are the sovereign.

> "The term 'citizen' as understood in our law is precisely analagous to the term subject in the common law, and the change of phrase has entirely resulted from the change of government. The sovereignty has been transferred from one man to the collective body of the people, and he who before was a 'subject of the King' is now 'a citizen of the State'" (State vs. Manuel, 3 Dev. & Battle's N. C. R., 26).

This Court has said that "By allegiance is meant

the obligation of fidelity and obedience which the individual owes to the Government under which he lives, or to his sovereign in return for the protection he receives" (Carlisle vs. United States, 16 Wall., 147, 154). In the case of Minor vs. Happersett, 21 Wall., 162, 166, Chief-Justice WAITE in speaking of allegiance, said: "Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance." According to Mr. Justice STORY in Inglis vs. Trustees of the Sailor's Snug Harbor, 3 Pet., 99, 155, "allegiance is nothing more than the tie or duty of obedience of a subject to the sovereign under whose protection he is; *and allegiance by birth is that which arises from being born within the dominions and under the protection of a particular sovereign.*"

If, then, a man is "subject to the jurisdiction" of the United States when he owes to them allegiance and is entitled to their protection, it would seem that both Wong Kim Ark and his father come within the requirement of the Fourteenth Amendment, and were, at the time of the former's birth, within the territory of the United States, "subject to the jurisdiction thereof."

It may be said that, under this construction of these words, they were unnecessary and there was no reason for their insertion in the Constitution. The other side may say that, if our argument is correct, it was sufficient to provide that any man born in the United States was a citizen thereof, as it follows that a man by the mere fact of his birth in this country owes the Government allegiance and is entitled to its protection, and is therefore "subject to its jurisdiction," as we interpret these words.

The purpose, however, of this clause was to except that class which had always been previously excepted from citizenship in a State by the mere fact of birth, viz.: the children of foreign ambassadors, who, under a fiction of law, were deemed the subjects of the country of their parents on the theory that "an Ambassa-

dor's house is reputed part of his Sovereign's realm," and the American Indians who, though born within the boundaries of our country, were deemed independent nations.

In the first section of the act of Congress approved March 26, 1790 (1 Stat. at Large, 103), it is enacted:

> "That any alien being a free white person, who shall have resided within the limits and *under the jurisdiction of the United States* for the term of two years, may be admitted to become a citizen thereof."

We take it that no difference in meaning can be assigned to the clause "under the jurisdiction of the United States," found in the naturalization act, and the words of the Fourteenth Amendment, "subject to the jurisdiction thereof." The words are used in the same connection in both places. In each case they have reference to a condition precedent to citizenship. A man, to be entitled to become a citizen by naturalization, must have been "under the jurisdiction of the United States" for two years. Only those born within the territory of the United States, and "subject to the jurisdiction thereof," can be citizens under the Constitution by reason of their birth.

The applicant for a certificate of naturalization is considered to have been "under the jurisdiction of the United States" during his alienage because he owes to this country allegiance and obedience to its laws and is entitled to its protection. The purpose of the words was undoubtedly only to except foreigners in the diplomatic service, who were considered subjects of the countries they represented and not "under the jurisdiction of the United States."

If any other interpretation was put upon these words as used in the Naturalization Act and they were supposed to except the alien residents of this country upon the ground that such alien residents were not "under the

jurisdiction of the United States," it is not plain how there could ever have been any practical application of this law. These words are still found in the Revised Statutes relating to naturalization (U. S. Rev. Stat., § 2165).

It is a little difficult to see what distinction can be drawn between the two cases. If an alien who resides in the territory of this country is "under the jurisdiction of the United States" for the purposes of naturalization, it would seem to follow that a man born here and always residing here must be "subject to the jurisdiction thereof," and must have been so at his birth.

Setting aside the fact that the petitioner below is of Chinese extraction (for "we may suspect that race was the cause of the hostility, but it is not so averred." U. S. vs. Cruikshank, 92 U. S., 542, 556), and assuming that the appellee was the son of a German alien, who had never been naturalized (which assumption will in no way affect the legal question involved here),it would then be very clear that his father, after his long years of residence in this country, would be entitled to a certificate of naturalization and was "under the jurisdiction of the United States" within the meaning of the act. If, then, the father is "under the jurisdiction of the United States," what is it which prevents the son, with the added fact of birth in our territory, being "subject to the jurisdiction thereof?"

This exception of the children of foreign ambassadors and the kindred exception of the Indians were well known to the framers of this amendment, and it was a matter of common knowledge that the former, leaving out the question of slaves, was the only substantial exception to citizenship by reason of birth which was known to the common law. It is a matter of history that the Fourteenth Amendment, and the contemporaneous legislation known as the Civil Rights Bill, were, in the opinion of Congress at the time, but declaratory of the rule in regard to citizenship, as known to

the common law. It has also been so held by the courts.

Judge DEADY in McKay vs. Campbell, 2 Sawy., 118–130, said:

> "It is not to be presumed that the amendment was made to the Constitution to change the rule of the common law, but rather to declare and enforce it uniformly throughout the United States and the several States."

In Minor vs. Happersett, 21 Wall., 162, 165, Chief-Justice WAITE, after saying that women were, without doubt, citizens of this country, and, after referring to the Fourteenth Amendment in support of his statement, says:

> "But in our opinion it did not need this amendment to give them that position."

In the note on page 49 of Kent's Commentaries (14th Ed.), after giving the words of the Fourteenth Amendment, it is said:

> "This seems to fix upon us the doctrine stated in the text, and derived from the principle of the common law, that all persons born within the dominions of the Crown, with hardly an exception, are to all intents and purposes British subjects."

Any debate of Congress on the Civil Rights Bill contains frequent statements that the bill is but declaratory of the common law as it already existed.

The Civil Rights Bill was approved April 9th, 1866 (14 U. S. Stat. at Large, 27), and was passed two years prior to the adoption of the Fourteenth Amendment to the Constitution. The words used therein relating to the question of citizenship are similar to those we are now seeking to define. They are as follows:

> " All persons born in the United States and not subject to any foreign power * * * are hereby declared to be citizens of the United States."

We do not see what substantial distinction can be drawn between the words of the Civil Rights Bill and the clause of the Fourteenth Amendment. In the one case the condition of citizenship is birth " not subject to any foreign power," and in the other it is birth " subject to the jurisdiction " of the United States.

The Civil Rights Bill was vetoed by President Johnson, and his interpretation of these words perhaps goes as far to show what they were supposed to mean at the time they were used as any other. It was very clear to him that a man in the position of Wong Kim Ark was not subject to the jurisdiction of any foreign power, and was subject to the jurisdiction of the United States, for he says in his veto message (Congr. Globe, 39th Congress, p. 1679):

> " By the first section of the bill all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, are declared to be citizens of the United States. *This provision comprehends the Chinese of the Pacific States*, Indians subject to taxation, the people called Gypsies, as well as the entire race designated as blacks, persons of color, negroes, mulattoes and persons of African blood. *Every individual of those races born in the United States is, by the bill, made a citizen of the United States.*"

In United States vs. Rhodes, 1 Abb. U. S. Rep., 28, the constitutionality of the Civil Rights Bill came up for decision in a Federal Court, apparently, for the first time. Mr. Justice SWAYNE in his opinion said at pages 38, 40 and 41:

"The act of Congress confers citizenship. Who are citizens, and what are their rights? The Constitution uses the words 'citizen' and 'natural-born citizens'; but neither that instrument nor any act of Congress has attempted to define their meaning. * * * All persons born in the allegiance of the king are natural-born subjects, and all persons born in the allegiance of the United States are natural-born citizens. Birth and allegiance go together. Such is the rule of the common law, and it is the common law of this country as well as of England. There are two exceptions, and only two, to the universality of its application. The children of ambassadors are in theory born in the allegiance of the powers the ambassadors represent, and slaves in legal contemplation are property, and not persons. * * *

"'Citizens under our Constitution and laws means free inhabitants born within the United States or naturalized under the laws of Congress.'

"*We find no warrant for the opinion that this great principle of the common law has ever been changed in the United States. It has always obtained here with the same vigor, and subject only to the same exceptions, since as before the Revolution.*"

As Lord COCKBURN says in his book on Nationality, page 7:

"By the common law of England every person born within the dominions of the Crown, no matter whether of English or of foreign parents, and, in the latter case, whether the parents were settled or merely temporarily sojourning in the country, was an English subject, save only the children of foreign Ambassadors (who were ex-

> cepted because their fathers carried their own nationality with them), or a child born to a foreigner during the hostile occupation of any part of the territories of England."

At page 12 of the same work is the following statement:

> "The law of the United States of America agrees with our own. The law of England as to the effect of place of birth in the matter of nationality became the law of America as part of the law of the mother country, which the original settlers carried with them."

If at common law every person born in a country was a citizen thereof with the single exception of the children of foreign ambassadors, and if the Fourteenth Amendment is but declaratory of the common law, it is difficult to see how any other exception than that found in the common law, was intended by the words "subject to the jurisdiction."

The case of Elk vs. Wilkins, 112 U. S., 94, does not, under any true interpretation, extend the meaning of these words. The argument, in the mind of the Court, was simply that children of ambassadors were excepted from the class of citizens by right of birth within the limits of the United States, because, by a fiction, they were deemed subjects of another country, and that likewise the Indians, though born within our geographical boundaries, were by reason of a peculiar environment subjects of another nation within our own, as we ourselves had considered and treated them for years.

We now come to the construction of this amendment by the lower Courts, and the most important case is that of *In re* Look Tin Sing, 10 Sawy., 353, decided by Mr. Justice FIELD. The same question was presented in this case in precisely the same way in which it arises here, and it was then held that a

Chingman born in the United States of parents not engaged in any diplomatic capacity was a citizen thereof. The opinion of Mr. Justice FIELD was concurred in by Judges SAWYER, SABIN and HOFFMAN. At page 359 the Court said :

> " The jurisdiction of the United States over him at the time of his birth was exclusive of that of any other country."

This is the idea which we have before sought to convey, viz. : that this country could not permit another nation to claim jurisdiction of a man born here. It is, perhaps, conceivable that this Government might in the future by some law permit the individual himself to elect, when of age, what nation he chose for his country, but it is out of the question for our Government to allow another government to say to what country a person born within our territory belongs. That is a national and not an international question, and no nation that we know of has gone so far as to suffer the persons born and still residing in its territory to be claimed by a foreign nation as its citizens. A man born in the United States is, therefore, a citizen of the United States (in the absence of any statute permitting him to elect what country he shall call his own) " unless perchance he should be a citizen of the world. The latter is a creature of the imagination and far too refined for any republic of ancient or modern times " (Talbot vs. Janson, 3 Dallas, 133, 153).

The United States, as well as every other nation, have long recognized the doctrine that they have no jurisdiction outside of their own boundaries, and that a person born in a foreign country is born outside of their jurisdiction and within the jurisdiction of the country of birth. In Section 1993 of the Revised Statutes it is enacted that " all children heretofore born or hereafter born out of the limits *and jurisdiction of*

the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States." By this section it is understood that all children of citizens born in foreign countries shall be deemed, so far as this country is concerned, citizens thereof, but by its express words it is stated that such persons are born *out of its jurisdiction*. If a person born of our citizens in the territory of a foreign power is born out of our jurisdiction, it is not plain why a person born within our limits of foreign citizens is not born out of the jurisdiction of the country of his parents. If born out of the jurisdiction of every country than the United States, then he must have been born "subject to the jurisdiction" of the United States.

The argument that, if the United States have passed a law declaring that children of our citizens born in foreign countries are citizens of the United States, they should then pass a law providing that children of foreigners born in this country are citizens of the country of their parents, can, of course, not be considered by this Court. The question here is what the people of the United States have done, and not what they might or ought to do; and no one doubts the right of this nation to so legislate, if its people should see fit, but so far it has not done so.

In the case of *ex parte* Chin King, 13 Sawy., 333, it was again held by Judge DEADY "that a child born in the United States of Chinese parents is, by the rule of the common law and the Fourteenth Amendment, a citizen of the United States" (syllabus).

Judge DEADY made a similar decision in the case of Yung Sing Hee, 36 Fed. Rep., 437, 438, saying that the petitioner "was born within or subject to the jurisdiction of the United States, and is, therefore, a citizen thereof."

The Circuit Court of Appeals for the Ninth Circuit in Gee Fook Sing vs. United States, 49 Fed. Rep., 146,

came to the same conclusion, Judge HANFORD writing the opinion.

Perhaps the latest case on this subject is Benny vs. O'Brien, 32 Atlantic Reporter, 696. The question before the Supreme Court of New Jersey was "whether a person born in this country of alien parents who, prior to his birth, had their domicile here, is a citizen of the United States," and in a very well considered opinion it was held that he was, the Court saying, at page 697:

> "Two facts must concur—the person must be born here, and he must be subject to the jurisdiction of the United States according to the Fourteenth Amendment, which means, according to the Civil Rights Act, that the person born here is not subject to any foreign power. Allan Benny, whose parents were domiciled here at the time of his birth, is subject to the jurisdiction of the United States, and is not subject to any foreign power. * * * Therefore Allan Benny is a citizen of the United States in virtue of his birth here of alien parents, who, at the time of his birth, were domiciled in this country."

In Fong Yue Ting vs. The United States, 149 U. S., 698, 716, this Court apparently approved of the right of citizenship by reason of birth in the United States, for it said:

> "Chinese persons *not born in this country* have never been recognized as citizens of the United States."

In Comitis vs. Parkerson, 56 Fed. Rep., 556, the Court decided that a native-born woman, by her marriage to an unnaturalized alien resident, did not cease to be a citizen of the United States. In speaking of the position of her husband in this country, Judge BILLINGS said (p. 563):

> " By virtue of his settlement and residence here the Constitution makes his children citizens of the United States."

The Solicitor-General has referred to a decision by Secretary Bayard in the Greisser case (2 Whart. Int. Dig., 399), in which it appeared that Richard Greisser, an applicant for a passport, was born in Ohio in 1867, of a German subject domiciled in Germany. He was taken from the United States by his parents when two years old and had always lived in Germany or Switzerland. The passport was denied to him, and Secretary Bayard said :

> " The son [the applicant], therefore, *so far as concerns his international relations*, was at the time of his birth of the same nationality as his father. Had he remained in this country till he was of full age and then elected an American nationality, he would, on the same general principles of international law, be now clothed with American nationality."

This is rather a dangerous authority for the Government to rely on here, as under it Wong Kim Ark would be held to be a citizen of the United States, he having remained here until twenty-one and having elected an American nationality. But, aside from that aspect of the Greisser case, Mr. Bayard first considered the question before him entirely from an international point of view. He then said " that the law of nations, as to particular matters, may be, as to such particular countries, either expanded or contracted by local legislation," and inquired as to how far the international rule had been affected by the legislation of the United States. He referred to Section 1992 of the Revised Statutes (Civil Rights Bill) and the Fourteenth Amendment of the Constitution, and without one word of reasoning or the citation of a single authority said that Richard Greisser " was on his birth

'subject to a foreign power,' and 'not subject to the jurisdiction of the United States.'"

Just why and in what way Greisser was subject to a foreign power Mr. Bayard does not tell us. Was he not still looking at the question from the standpoint of the law of nations? Had he freed himself from the view, which many nations have adopted as in their opinion the most liberal, that the nationality of a child is to be determined by the nationality of his father, and not by the place of his birth. It is not plain how Greisser, when born, was in any true sense not "subject to the jurisdiction of the United States." If the German Government had sent its officers to Ohio to bring the father of Greisser, or Greisser himself, back to Germany, and compel him to join the German army, would it have been permitted? Would they not both, father and son, immediately upon their seizure, have been released by our courts upon a writ of *habeas corpus?* Would not both have been held to have been within the safeguards of the Constitution and entitled to the protection of the laws of this country (Chinese Cases, 149 U. S., 698, 716, 724)? Internationally, and perhaps theoretically speaking, Greisser and his father may have been "subject to a foreign power," but locally and practically they were subject to the jurisdiction of the United States.

Whenever international law conflicts with the local law of a particular country, "the law of nations, as to particular matters, may be, as to such particular countries, either expanded or contracted by local legislation" (Secretary Bayard, *supra*). This principle our government would be the first to adopt should any foreign country send its emissaries to our shores for the purpose of compelling those of its subjects who had emigrated to the United States and had not become naturalized or their children born on our soil, to return to the country of their origin. Even enmity to the Chinese race would not permit the creation of any such dangerous precedent.

If this case should be decided in favor of the Government, and it should be held that children born in this country to an alien resident are not "subject to the jurisdiction of the United States" and are "subject to a foreign power," what reply can the Secretary of State make to the Government of Russia or Germany or England in the case suggested? Must he say:

I admit that the highest tribunal of my country has decided that the men you are taking away by force to join your armies are not 'subject to the jurisdiction' of my government, and are subject to the jurisdiction of yours, but that decision does not mean that they are subject to the jurisdiction of your government in the sense that obedience can be compelled to that government and its laws, or that they are 'not subject to the jurisdiction' of my government in the sense that the protection of the Constitution and the laws of this country is withheld from them, and these men, born in this country of subjects of your government, who have been seized by your officers, must be released or the friendly relations between our two governments must cease.

Before the United States is forced to take this position, it would seem wise for the Solicitor-General not to attach too great importance to a hastily considered letter of Secretary Bayard, as it would appear that he arrived at the decision expressed by him because of his confounding the question he was then deciding with the question in its supposed international aspect, which was the subject of the first part of his letter to Mr. Winchester, the then Minister to Switzerland.

Further than that the construction put on these words of the Fourteenth Amendment by Mr. Bayard were in no way required by the case before him. It was a mere *obiter dictum*. The question raised by the facts presented to Secretary Bayard was simply whether a United States passport should be given to Greisser to enable him to travel from one European country to another under the care and protection of this Government.

It was strictly an international question and to be considered solely in that aspect.

The question was before the Hon. E. R. HOAR when Attorney-General, as to whether the children born abroad, and there residing, of citizens of the United States, were entitled to passports. He was clearly of opinion that, under our statutes, those who had applied for passports were citizens of the United States, but he seemed to doubt the propriety of this Government issuing passports to them. He said, in 13 Opin., A. G., 89, 91:

> "I understand a passport to be a certificate of citizenship. * * * But while the United States may, by law, fix or declare the conditions constituting citizens of the country within its own territorial jurisdiction, and may confer the rights of American citizens everywhere upon persons who are not rightfully subject to the authority of any foreign country or government, it is clear that the United States cannot, by undertaking to confer the rights of citizenship upon the subjects of a foreign nation, who have not come within our territory, interfere with the just rights of such nation to the government and control of its own subjects. If, therefore, by the laws of the country of their birth, children of American citizens, born in that country, are subjects of its Government, I do not think that it is competent to the United States by any legislation to interfere with that relation, or by undertaking to extend to them the rights of citizens of this country to interfere with the allegiance which they may owe to the country of their birth while they continue within its territory, or to change the relation to other foreign nations which, by reason of their place of birth, may at any time exist. The rule of the common law I understand to be that a person 'born in a

> strange country under the obedience of a strange prince or country is an alien' * * * if the applicants can receive any passport from your department it would seem that it must be a qualified one, which should state that, although they were citizens of the United States, they were only so in the qualified sense which I have indicated."

Greisser, under international law, being a citizen of Germany or of Switzerland at the time he applied for his passport just as much as a citizen of the United States, there was no reason why he should not have obtained a passport from the country where he lived. In other words, Mr. Bayard might have placed his rather lengthy decision upon the brief grounds stated by his predecessor, Mr. Evarts, when he wrote: "A child who, born in the United States to French parents, goes in his minority to France, and there remains voluntarily after he has become of full age, *may be held to have abjured his American nationality*" (2 Whart. Int. Dig., 396). That is to say, the Greisser case is not the case at bar, and the construction of the amendment of the Constitution was not requisite for its decision. Greisser at the time of his birth was a citizen of this country, but had abjured his nationality, and at the time he asked for a passport he had ceased to be a person born in the United States and subject to the jurisdiction thereof as he was at his birth, but was a person born in the United States and since become subject to a foreign power. He had expatriated himself, and was not entitled to a passport.

There is no expression of opinion, except the letter of Secretary Bayard in the Greisser case, which is contrary to the decisions cited, and we therefore have an unquestioned judicial interpretation of the Constitution acquiesced in for years. The only reason given by the counsel for the Government for now desiring to change this construction is that by international law or

Roman law, or some other law than the law of the United States, the petitioner would not be considered a citizen thereof. It is important to notice that the counsel for the Government does not claim that under international law or Roman law the appellee would not be "subject to the jurisdiction" of the United States, but simply that he would not be a citizen thereof.

The true question is whether Wong Kim Ark at the time of his birth was "subject to the jurisdiction" of this Government. If he was, it follows that he was a citizen of the United States by virtue of the Fourteenth Amendment, without regard to what constitutes a citizen under the rules of international law or any other law.

The argument of the Government and of the *amicus curiæ* is interesting but theoretical. Its tendency is to draw us away from the real question, whether a State should not determine by its own law alone who are its citizens, or, as Attorney-General Bates says in 10 Opin. of Atty-Gen., 382, 390:

> "The discussion of this great subject of national citizenship has been much embarrassed and obscured by the fact that it is beset with artificial difficulties extrinsic to its nature. * * * And these difficulties, it seems to me, flow mainly from * * * the common habit of many of our best and most learned men * * * of testing the political status and governmental relation of our people by standards drawn from the laws and history of ancient Greece and Rome, without, as I think, taking sufficient account of the organic differences between their governments and ours."

The question who is a citizen of a country is essentially a practical one, to be approached from a practical point of view; but counsel for the Government seem to

have forgotten the principles declared by the Court in State vs. Manuel, 4 Dev. & Battle's N. C. Rep., 20, 29, in deciding who was a citizen of North Carolina, when it said :

> " Constitutions are not themes proposed for ingenious speculation; but fundamental laws ordained for practical purposes. Their meaning once ascertained by judicial interpretation and contented acquiescence, they are laws in that meaning until the power that formed, shall think proper to change them."

The only question in the present case is as to the construction of the Constitution of the United States. This Court is asked to define the meaning of the words " subject to the jurisdiction " of the United States. It has not been clearly pointed out by counsel for the Government how International Law can control a question of national law, nor why this Court should resort to the law of nations to assist it in interpreting the law of its own country.

It is clear that a nation must have some rule by which to determine who are its citizens. Our argument is that the United States when it adopted the Fourteenth Amendment declared in favor of the simple doctrine that birth within the dominions of a country conferred the right of citizenship therein and intended only to formulate the law as it was then understood in the United States.

The argument of the Solicitor General is that this government, through the Fourteenth Amendment, intended to introduce the more modern and complicated principle of so-called international law (modern at least in the sense that it was never thought of until after the United States had declared their independence), that a child inherited the nationality of his parents, wherever he might be born, and so creating a race of people who, though born and reared

in this country, were to be deemed subjects of a foreign State, and who could not be naturalized under our law, as birth in a foreign country seems necessary to enable a person to take advantage of our Naturalization Act.

The question presented here would seem to be whether the people of the United States, by their adoption of the Fourteenth Amendment to the Constitution, intended to make that a written law which was already the unwritten law of their country, and with which they were familiar, or purposed to introduce the Roman law or the so-called Law of Nations, or more accurately speaking the statute law of some one of the countries of Europe, of which they as a body knew nothing whatever, and which was in seeming conflict with the naturalization acts already on their statute books.

We have not here to decide which is the better doctrine or whether the elective system of the Continental countries of Europe is more in accord with the progress of nations. We do not dispute the right of the people of the United States to amend the Constitution by declaring that "all persons born in the United States of alien parents, who have not been naturalized, shall be deemed citizens and subjects of the country from which their parents came, with the right when of age to become naturalized citizens of the United States." We do not undertake to say that such an amendment would or would not be an improvement upon the Constitution, as we say it stands to-day.

In the case of Tape vs. Hurley, 66 Cal., 473, the question was as to the right of a Chinese girl, who was born and had always lived in the City and County of San Francisco, to admission in the public school of the district in which she resided. The Code of California provided that: "Every school, unless otherwise provided by law, must be open for the admission of all children between six and twenty-one years of age re-

siding in the district." The Court held that she was entitled to attend the school in question, and said (p. 474):

> "As the Legislature has not denied to the children of any race or nationality the right to enter our public schools, the question whether it might have done so does not arise in this case."

So in the case at bar, the people of the United States have not denied to the children born in this country of alien parents the right of citizenship therein, nor have they passed any law declaring them to be the citizens or subjects of the country of their parents, and the question whether they might have done so does not arise in this case.

Our position is that any such discussion is foreign to the issue here, which is what is meant by the words "subject to the jurisdiction thereof," and we respectfully submit that the people of this country intended that these words should be construed in accordance with the principles of law of which they and their fathers before them had knowledge, and not in accordance with the Roman law or the law of any European country with which they were unfamiliar. In other words, they intended that the status of citizenship in the United States should be determined in accordance with the law of the United States and not upon the principles of the Roman law.

POINT II.

Wong Kim Ark is under the common law a citizen of the United States.

The Fourteenth Amendment is conceded to be simply an enactment of the law as it was then understood to exist in this country. It must, therefore, be assumed that, by the common law, birth "subject to the jurisdiction" of the United States, was the condition of citizenship therein, and it is necessary to examine the decisions prior to the adoption of the Fourteenth Amendment to ascertain what was considered under the common law a sufficient subjection to the jurisdiction of the United States to make a man a citizen thereof, and we, perhaps, cannot find a better statement of the rule than that of Mr. Justice STORY, when he said, in Inglis vs. Sailors' Snug Harbor, 3 Pet., 99, 164: "*Nothing is better settled at the common law than the doctrine that the children even of aliens born in the country, while the parents are resident there, under the protection of the government, and owing a temporary allegiance thereto, are subjects by birth.*"

The great case of Lynch vs. Clarke, 1 Sand. Ch., 583, was decided in 1844, and has since remained the leading authority upon the question. The case was twice argued and the briefs of counsel are printed in full in the report of the case. They are exhaustive of the subject and very able. The decision itself is remarkable and shows a complete comprehension of the question, coupled with long and patient research.

The bill in the cause was filed by one Bernard Lynch for the purpose of obtaining a declaration that one Clarke was seized of the celebrated Congress Springs in trust for Thomas Lynch, of New York City, then deceased, and that the plaintiff was entitled to all the equitable interests which Thomas Lynch had in the property. Clarke and Thomas Lynch had been part-

ners, and obtained control of the land at Saratoga in the course of their partnership dealings. Julia Lynch was made a defendant in the suit. She was born in the City of New York in 1819. Her father was Patrick Lynch, a brother of Thomas Lynch, the partner of Clarke. Patrick Lynch was a British subject, who came to this country to live in 1815. He was never naturalized and left this country in 1819, soon after his daughter Julia was born, taking her with him. Patrick Lynch never returned to this country except on a temporary visit without his family, when he remained six months. Julia Lynch did not return to the United States until 1834, after the death of her uncle, Thomas Lynch, who was the partner of Clarke.

In her answer the defendant Julia Lynch insisted that she was a native-born citizen of the United States, and, as such, inherited all the real estate of which Thomas Lynch was seized.

In the Lynch case, therefore, the identical question was argued and decided which is presented here, viz.: Is the child born in the United States to an alien resident a citizen thereof?

The only difference between the two cases is that the appellee in the present case has always lived in the United States, whereas Julia Lynch was taken out of the country when still an infant in arms and did not return until she was fifteen years old.

It was urged in behalf of the complainant Lynch, as it is argued here, that there was no common law in the United States. The Chancellor fully and carefully considered the question from this point of view. He quoted with approval from the speech of Mr. Bayard in the House of Representatives in 1802, in which he said: "The Judges of the United States have held generally that the Constitution of the United States was predicated upon an existing common law. * * * The Constitution is unintelligible without reference to the common law. * * * Without this law the

Constitution becomes a dead letter" (p. 654), and expressed himself in the following language at page 652:

> "The Constitution of the United States, like those of all the original States, * * * presupposed the existence and authority of the common law. The principles of that law were the basis of our institutions. In adopting the State and national Constitutions * * * our ancestors rejected so much of the common law as was then inapplicable to their situation, and prescribed new rules for their regulation and government. But in so doing, they did not reject the body of the common law. They founded their respective State Constitutions and the great national compact upon its existing principles, so far as they were consistent and harmonious with the provisions of those Constitutions."

After a most careful analysis of all the authorities on the subject, it was decided that Julia Lynch was a native-born citizen of the United States, and the Chancellor said at page 663:

> "Upon principle, therefore, I can entertain no doubt, but that by the law of the United States, every person born within the dominions and allegiance of the United States, whatever were the situation of his parents, is a natural-born citizen."

In the case of State vs. Manuel, 4 Devereux & Battle's N. C. R., 20, the defendant was convicted of an assault and battery, and was sentenced to pay a fine of twenty dollars, and, it appearing to the Court that he was a free person of color and unable to pay the fine, it was ordered that the Sheriff should hire out the defendant to any person who would pay the said fine for his services for the shortest space of time. From this

judgment the defendant appealed upon the ground that the act under which he had been sentenced was in conflict with the Constitution of North Carolina.

Upon the argument of the appeal the Attorney-General insisted that it was not necessary to examine any constitutional question, for the reason that the defendant could not claim the benefit of the Constitution because he was "*not a citizen of North Carolina.*"

The Court did not agree with the Attorney-General, and expressly decided that a free person of color *if born in North Carolina* was a citizen of North Carolina. The judgment was affirmed for the reason that the Court did not think that the law under which the defendant had been sentenced was in conflict with the Constitution of the State, but upon the question which is of interest in the case at bar the views of the Court were very strong and it was held that citizenship was conferred on free persons by birth, irrespective of any other fact.

> "Whatever distinctions may have existed in the Roman law between citizens and free inhabitants, they are unknown to our institutions. Before our Revolution all free persons born within the dominions of the king of Great Britain, whatever their colors or complexion, were native-born British subjects; those born out of his allegiance were aliens. Slavery did not exist in England, but it did exist in the British colonies. Slaves were not in legal parlance persons, but property. The moment the incapacity—or disqualification of slavery was removed—they became persons, *and were then either British subjects or not British subjects, accordingly as they were or were not born within the allegiance of the British king.* Upon the Revolution, no other change took place in the law of North Carolina than was consequent upon the transition from a colony dependent on an European king to a free

> and sovereign state. Slaves remained slaves. British subjects in North Carolina became North Carolina freemen. Foreigners, until made members of the State, continued aliens. Slaves manumitted here become freemen, *and therefore if born within North Carolina are citizens of North Carolina, and all free persons born within the State are born citizens of the State*" (p. 24).

The opinion in State vs. Manuel was written by Judge GASTON, whom Mr. Justice SWAYNE called "one of the most able and learned Judges this country has produced" (United States vs. Rhodes, 1 Abb. U. S. Rep., 28, 42). The Supreme Court of North Carolina, in the subsequent case of State vs. Newsom, 5 Ired., 250, 253, referred to State vs. Manuel in these words: "That case underwent a very laborious investigation both by the bar and the bench. * * * The case was brought here by appeal, and was felt to be one of great importance in principle. It was considered with an anxiety and care worthy of the principle involved, and which give it a controlling influence and authority on all questions of a similar character."

In the case of the United States vs. Douglas, 17 Fed. Rep., 634, an information was filed against the master of the British bark "Eme" for bringing and landing within the port of Boston one Ah Shong, alleged to be a Chinese laborer, contrary to the Act of Congress of May 6, 1882, which made it a misdemeanor for the master of any vessel to "knowingly bring within the United States on such vessel, and to land or permit to be landed any Chinese laborer from any foreign port or place."

It appeared that Ah Shong had never been a subject or lived in the dominions of the Emperor of China, but that he had been born of Chinese parentage in the Island of Hong Kong after its cession by China to Great Britain in 1842, and that he was and had been from his birth a subject of the Queen of Great Britain.

The Circuit Court for the District of Massachusetts held that the Chinese Exclusion Acts only related to subjects of the Government of China, and that, therefore, Ah Shong, *being a British subject by reason of his birth in the territory of Great Britain*, was not within the purview of the Act of Congress which excluded Chinese laborers from the United States.

In the subsequent case of *In re* Ah Lung, 18 Fed. Rep., 28, it was held by Mr. Justice FIELD that the Chinese Exclusion Act did apply to a Chinaman who was a British subject by reason of his birth in the Island of Hong Kong after its cession to Great Britain. There is, however, no suggestion in his opinion that Ah Lung was not, at the time of his application for permission to enter the United States, a British subject; and the ground of the decision is that the language of the Exclusion Act was "sufficiently broad and comprehensive to embrace all Chinese laborers without regard to the country of which they may be subjects" (p. 32).

These two cases are of great interest in that they deal with the subject from an impersonal point of view and as it applies to another country. It is seemingly decided as a question upon which there can be no doubt that a man born in English territory of Chinese descent is a British subject. If a child born of Chinese parents in English territory is a British subject, it would seem that a child born of Chinese parents on the soil of the United States was an American citizen. That is to say, it is assumed in the cases just referred to that, under the common law, birth within the dominions of a nation confers citizenship therein, and that a man so born is subject to its jurisdiction.

In the case of Lyndon vs. Danville, 28 Vt., 809, the question was as to the proper settlement of a pauper. The facts were as follows: One Ralph Chamberlin, the father of the pauper, was born in Danville, Vermont, in 1800, and had a legal settlement in that town. He married in 1822, and thereafter moved to Stanstead, in the province of Canada East, and there remained until his

death in 1844. The pauper was born in Stanstead in 1826, and, when five or six years old, was brought to Lyndon, Vermont, by his mother. The pauper lived most of his life in Lyndon, and was removed in 1853 to Danville, on the ground that he was a proper charge upon the latter town, as having a derivative settlement there from his father and grandfather. The County Court held that the pauper had a legal settlement in the town of Danville. To this ruling the said town excepted and the exception was sustained upon the ground that the pauper, by reason of his birth in Canada, was an alien and could, therefore, derive no settlement from his father. The Court said at p. 816:

> "The pauper, during his life, could be regarded only as an alien, and subject to all the incapacities of one. He was under no natural allegiance to this country, and the correlative duty of protection was not due from this country to him, except such as is due to all aliens during the time they are within its jurisdiction. * * * Judge SWIFT (2 Swift's Dig., 618), says that 'by the common law, the children of private citizens born abroad are aliens.' Chancellor Kent has remarked (2 Kent's Com., 1) that 'that is the rule of the common law without any regard or reference to the political condition or allegiance of their parents, with the exception of embassadors.' * * * Surely the pauper, in this case, must be regarded as an alien and a subject of the Province of Canada, without reference to the citizenship of his father."

In Albany vs. Derby, 30 Vt., 718, the syllabus is as follows:

> "The offspring of a citizen of this State, born subsequent to April 14, 1802, in a foreign gov-

> ernment to which their father had removed *animo manendi*, and who return with their father to the United States after they have become of age, are aliens."

In Dupont vs. Pepper, 1 Harp. Ch. (S. C.), 5, the Court said at page 11:

> "I come, then, to the conclusion, that by the common law, children born abroad could not inherit lands in England, even from their parents who were native subjects. *The character of a natural-born subject, anterior to any of the statutes, was incidental to birth alone.*"

This part of the decision of the South Carolina Court was not reversed by this Court when the case was brought here by writ of error under the title of Shanks vs. Dupont, 3 Pet., 248.

In De Geer vs. Stone, L. R., 22 Ch. Div., 243, it is said in the headnote:

> "There is no foundation for the notion that by the common law of England the posterity of a natural-born British subject, though born abroad, must be treated as British subjects forever.
>
> "The rule that the children born abroad of ambassadors in the service of the Crown of England abroad, are treated as natural-born British subjects, does not apply to the children born abroad of officers in the military service of the Crown in foreign parts."

The different Attorney-Generals of the United States seem to have been very clear in their opinion that birth in this country of alien residents conferred citizenship therein. Mr. Black in a letter to Mr. Cass (1859) 9 A.-G. Opin., 373, said:

> " A free white person born in this country, of foreign parents, is a citizen of the United States."

Mr. Bates in writing to Mr. Seward (1862), 10 A.-G. Opin., 328 was of the same opinion :

> " A child born in the United States of alien parents, who have never been naturalized, is, by the fact of birth, a native-born citizen of the United States, entitled to all the rights and privileges of citizenship."

Mr. Fish, when Secretary of State, made the same ruling in two cases which came before him and said (2 Whart. Int. Dig., 396) :

> " So far as concerns our own local law, a child born in the United States to a British subject is a citizen of the United States."

And again

> " The minor child of a Spaniard, born in the United States and while in the United States, or in any other country than Spain, is a citizen of the United States."

Chapter 120 of the Laws of New York of 1872 is, according to its title, " An Act to authorize the descent of real estate to female *citizens* of the United States," and the chief condition precedent to citizenship seems to have been considered by the New York Legislature to have been birth in the United States, for it is provided by this statute that " real estate in this State now belonging to or hereafter coming or descending to *any woman born in the United States or who has been otherwise a citizen thereof.*"

At the time of the adoption of the Constitution it was the law, not only of England and her colonies, but of the Continental countries of Europe, that a child

born within the territory of any government was a citizen thereof. Whatever change there may be at the present time in the countries of Europe in this respect has been brought about since the United States became an independent nation, and is the result of the Code Napoleon, which adopted the principle of election, and permitted a person born in France of foreign parents to elect, when coming of age, either France or the country of his parents as his country.

The appreciation of the people of the United States at the time of the foundation of their government that the general doctrine of all countries was that a man became by birth alone a citizen of the country in which he was born is, we think, shown by the Act of Congress approved March 26th, 1790, which provided that

> "the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens" (1 Stat. at Large, 103, 104).

Without doubt this act was passed to enable children of citizens of the United States, born in other countries, to inherit real estate in this country and to permit them, if they should ever come here, to enter into the rights and privileges of full citizenship without the delay of naturalization. It was passed not to take away the status of the children so far as the country was concerned in which they were born, but to change the rule in regard to their relations to this country as it was then and has always since been understood. Without this law children born abroad of citizens of the United States would come to this country with all the disabilities of aliens, and they would have been debarred at that time in nearly every State from inheriting real property.

The purpose of the act was not to change the relation of other governments to people born within their

dominions, but to change the status of those people to our own Government, from what it was understood to be in this country without such law. The same idea was in the mind of Mr. Justice IREDELL, when he said in Talbot vs. Janson, 3 Dallas, 133, 164:

> "Did any man suppose, when the rights of citizenship were so freely and honorably bestowed on the unfortunate Marquis de la Fayette, that that absolved him as a subject or citizen of his own country? It had only this effect, that whenever he came into this country and chose to reside here he was *ipso facto* to be deemed a citizen, without anything farther. The same consequence, I think, would follow in respect to rights of citizenship conferred by the French Republic upon some illustrious characters in our own and other countries."

In the case of Calais vs. Marshfield, 30 Me., 511, 518, 520, Chief-Justice SHEPLEY said:

> "The laws of the United States determine what persons shall be regarded as citizens irrespective of such person's pleasure. Accordingly the Act of Congress before named [6 Stat. at Large, 79], has been considered as determining that persons were entitled to be regarded as citizens, who were born and had ever continued to reside without the limits of the United States, being the children of citizens; *and such persons might at the same time be the subjects owing allegiance to the government of the country in which they were born.* * * *
>
> "Although the government of one country may grant to persons owing allegiance to that of another, the rights and privileges of citizenship, it is not intended to intimate, that the government making such grant would thereby and without their consent or change of domicile be-

> come entitled to their allegiance in respect to any of their political duties or relations."

If it was already the law that children born in a country of alien parents took the nationality of their parents it is not plain how this statute served any useful purpose. The fact of its passage "affirms the deficiency of the common law" (Binney's Article in 2 Amer. Law Reg., 193, 203).

The naturalization laws were subsequently amended several times, but the provision above referred to was not in any way changed until the Act of Congress of April 14th, 1802, was passed, which repealed all then existing laws on the subject, and provided that "the children of persons who *now are or have been* citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States."

It will be noticed that children born in foreign countries of American citizens, who were themselves born after the passage of this act, were not thereby made citizens of the United States. The act, in its terms, applied only to the children of those who then were or had been citizens of the United States.

This remained the state of the naturalization law upon this subject until the Act of Congress of 1855 (10 U. S. Stat. at Large, 604), which was incorporated in Section 1993 of the Revised Statutes and is the law to-day. This section provides that :

> "All children heretofore born, or hereafter born, out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth, citizens thereof, or declared to be citizens of the United States."

The passage of the Act of 1855, has always been attributed to an article said to have been written by Horace Binney, and published in the second volume of

the "American Law Register," at page 193. This article is entitled "The Alienigenæ of the United States," and begins with these words :

> "It does not, probably, occur to the American families who are visiting Europe in great numbers, and remaining there, frequently, for a year or more, that all their children born in a foreign country are Aliens, and when they return home will return under all the disabilities of aliens. Yet this is indisputably the case."

The Act of 1855, is nearly, if not exactly, in the identical words of the proposed legislation suggested by Mr. Binney in his article just referred to, and the people of this country evidently agreed with Mr. Binney that a person born in another country of citizens of the United States was an alien, unless relieved from such alienage by special legislation.

The discussion of this question by Mr. Binney is most exhaustive and interesting. It leaves nothing for further research prior to the time it was written and seems to show conclusively that without statute and under the common law people born in foreign countries of citizens of the United States were aliens. He says in part :

> "The state of the law in the United States is easily deduced. The notion that there is any common law principle to naturalize the children born in foreign countries, of native born American father and mother, father or mother, must be discarded. There is not and never was any such common law principle. But the common law principle of allegiance, was the law of all the States at the time of the Revolution, and at the adoption of the Constitution ; and by that principle the citizens of the United States are, with the exception before mentioned, such only

> as are either born or made so, born within the limits and under the jurisdiction of the United States, or naturalized by the authority of law, either in one of the States before the Constitution, or since that time, by virtue of an act of the Congress of the United States." The Alienigenæ of the United States (2 Amer. Law Reg., 193, 203).

We confess that we do not quite understand what is meant by the *amicus curiæ* when he says in his brief at page 27:

> "The repulsive absurdity of the monstrous doctrine of double allegiance is so forcibly apparent as to render wholly inexcusable any attempt at these times to invoke it."

We had always supposed that the doctrine of double allegiance was essentially an American doctrine, and that the dual relation of each citizen to the Federal and State Governments was the distinctive mark of the system of government in this country. No difficulty seems to have been apprehended by this Court from the fact that a man owed a double allegiance, and was a subject or citizen of two governments, for it is said in United States vs. Cruikshank, 92 U. S., 542-550:

> "The people of the United States, resident within any State, are subject to two governments—one State and the other national—but there need be no conflict between the two. The powers which one possesses, the other does not. They * * * have separate jurisdictions. * * * It may sometimes happen that a person is amenable to both jurisdictions for one and the same act. * * * This does not, however, necessarily imply that the two governments possess powers in common or bring them into con-

> flict with each other. *It is the natural consequence of a citizenship which owes allegiance to two sovereignties, and claims protection from both.* The citizen cannot complain, because he has voluntarily submitted himself to such a form of government. He owes allegiance to the two departments, so to speak, and within their respective spheres must pay the penalties which each exacts for disobedience to its laws. In return he can demand protection from each within its own jurisdiction."

The supposed dilemma of a double allegiance would appear to be in no way obviated even if the people of the United States should pass such a law as the appellant advises and should enact that children born to alien residents might elect their nationality when of age. Prior to coming of age such persons would be either of no nationality or else of a double nationality. After the age of twenty-one, if they elected the nationality of their parents, they would then owe to the United States the allegiance resulting from residence here and the allegiance due to the country of their election. In other words, a man who lives in a foreign country always owes a double allegiance, and as a practical matter the allegiance due to the country of his residence is of primary importance. To adopt the words of Mr. Justice STORY, used by him in a somewhat different relation, he is "bound *ad utriusque fidem regis.* In an American Court we should be bound to consider him as an American citizen only ; in a British Court he would, upon the same principle, be held a British subject" (Inglis vs. Sailors' Snug Harbor, 3 Pet., 99, 161.)

The objection, therefore, of counsel for the Government that a double allegiance results from the law in the United States as it is at the present time, would seem also to apply to the doctrine which the appellant seeks to maintain and is obviously nothing but the re-

sult of a person taking up his residence in a foreign country. "Foreigners in a country are subject to two sovereignties" (Westlake on Int. Law, 126). If by a law of the United States Wong Kim Ark was declared to be a citizen or subject of the country of his parents, he would then owe an allegiance to the United States while he remained here, as well as to the country which had been forced upon him. If, on the other hand, when twenty-one, he had the privilege of election, and elected, as he has done, this country as his nationality, in conformity with the law of many European countries, which the appellant's counsel insists should be our law too, he would still be guilty of being an exponent of "the repulsive absurdity of the monstrous doctrine of double allegiance," for the Emperor of China would continue to consider him as his subject, as the counsel for the Government say the Emperor of China does now. He would then be under the so-called law of nations also a citizen of the United States, and we should still have this nightmare of a double allegiance.

In other words, there is nothing "monstrous" or "repulsive" or "absurd" in the doctrine of double allegiance, and it is the necessary consequence of residence in a foreign country.

The fear suggested at page 34 of the brief of the *amicus curiæ* that our next president might be a Chinaman is equally uncalled for. If a modern Confucius or a greater than Li Hung Chang should be born upon our soil, and the people of the United States should be of the opinion that he was the best person in this country for their president, it is not plain where, if he were elected, the disgrace would lie; but, if there were any, it would seem to fall, not on the Chinese race, but on the white citizens of the United States, who selected a Chinaman as the highest officer of their government.

The counsel for the appellant in their discussion of the principles of international law have forgotten that a man is called a "citizen" of the United States "to

designate by a title the person and the relation he bears to the nation," and that, when the word is so used, "it is understood as conveying the idea of membership of a nation and nothing more" (Minor vs. Happersett, 21 Wall., 162, 166), and that "Citizenship has no necessary connection with the franchise of voting, eligibility to office, or, indeed, with any other rights—civil or political. Women, minors and persons *non compos* are citizens, and none the less so on account of their disabilities" (United States vs. Rhodes, 1 Abb. U. S. Rep., 28, 43).

There would seem to be a remarkable unanimity of opinion in every quarter in which the question ever arose that a person born in this country of alien residents was a citizen thereof both at the common law and under the Fourteenth Amendment to the Constitution. This Court, the lower Federal Courts and the State Courts have been in accord on this subject without a single dissenting voice. The law officers of the general Government and the various Secretaries of State, with the possible exception of Mr. Bayard, have held the same view and the weight of authority at least appears to be in favor of the proposition that birth in the United States confers citizenship therein, so long as the parents of the child, irrespective of their nationality, are residents of this country.

The only argument advanced by the other side against this position is—(1st) that some European countries have adopted the principle of election and that the United States should do the same, which is a question for Congress to determine; (2d) that by so doing "the repulsive absurdity of the monstrous doctrine of double allegiance" would be done away with, which is not at all clear, and (3d) that if the judgment below was affirmed, a Chinaman might be President of the United States.

We respectfully submit to this Court the question which of these arguments should prevail, and we close our brief with the words of Charles Sumner:

"Here is the great charter of every human being, *drawing vital breath upon this soil*, whatever may be his condition and *whoever may be his parents*. He may be poor, weak, humble, or black—he may be of Caucasian, Jewish, Indian or Ethiopian race—he may be of French, German, English or Irish extraction; but before the Constitution all these distinctions disappear. He is not poor, weak, humble or black, nor is he French, German, English or Irish; he is *man*, the equal of all his fellowmen. He is one of the children of the State, which, like an impartial parent, regards all its offspring with an equal care" (Argument of Charles Sumner on Equality before the Law, quoted in 2 Story on the Constitution, 5th Ed., 1935).

POINT III.

Wong Kim Ark is a citizen of the United States, if the laws of European countries are to determine the question.

As we have shown before, thirteen countries of Europe, including England and France, have adopted, in one form or another, as their law, that children born in their territory, of foreign parents residing therein, have the right of election, and can choose, when of age, if they see fit, the nationality of their parents or the nationality of the country of their birth.

By the agreed statement of facts, the appellee is shown to have been born here, to have lived here ever since his birth, and to have elected this country as his nationality. This would seem to dispose of the case in

favor of the appellee under the doctrine of the law of nations, as it is called by the appellant, or, more properly speaking, under the law of many of the countries of Europe, if it has any application whatever.

POINT IV.

The judgment below discharging Wong Kim Ark from the custody of the Collector of Customs at the Port of San Francisco upon the ground that he was a citizen of the United States should be affirmed.

MAXWELL EVARTS,
Of Counsel for Appellee.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 449.

THE UNITED STATES, APPELLANT,

vs.

WONG KIM ARK, APPELLEE.

Appeal from the District Court of the United States for the Northern District of California.

BRIEF FOR THE APPELLEE.

PRELIMINARY STATEMENT.

The question presented by the record is whether or not the appellee, Wong Kim Ark, is a natural-born citizen of the United States, under and by virtue of the first section of the Fourteenth Amendment of the Constitution, which ordains and declares:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No

State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law."

The appellee was born in the city of San Francisco, in the year 1873, of parents who were Chinese subjects and persons of Chinese descent, but who, at the time of the birth of the appellee, were domiciled and engaged in business in San Francisco. (Statement of Facts, I, II, Record, p. 10.)

The petition for the writ of *habeas corpus* avers, and it is not denied, that the parents of the appellee came to this country prior to the year 1873, under the invitation contained in the "*Burlingame Treaty*," which was concluded, it will be remembered, on the 28th of July, 1868. (Petition, Rec., p. 6.)

The month of July, 1868, is a memorable one in the political history of this country.

It was on the 20th of July, 1868, that the Secretary of State issued his proclamation promulgating the Fourteenth Amendment as a part of the Constitution of the United States; and on the 27th of July, 1868, Congress passed the act "concerning the rights of American citizens in foreign States," which declared that "the right of expatriation is a natural and inherent right of ALL PEOPLE, indispensable to the enjoyment of life, liberty, and the pursuit of happiness, and in recognition of this principle this Government has freely received emigrants from all nations and invested them with the rights of citizenship," and providing that "any declaration, instruction, opinion, order, or decision of any officer of this Government which denies, restricts, impairs, or questions the right of expatriation is hereby declared inconsistent with the fundamental principles of this Government." (Proclamation, July 20, 1868, 15 Stats., 706; act July 27, 1868, *Ib.*, p. 223.)

The United States and China, by the Treaty of 1868, recog-

nized "the inherent and inalienable RIGHT OF MAN to change his home and allegiance, and also the mutual advantage of the free migration and emigration of their citizens and subjects, respectively, from the one country to the other for purposes of curiosity, of trade, or as *permanent residents*."

By article 6 of the treaty it was declared that Chinese subjects "visiting or residing in the United States shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence as may be there enjoyed by the citizens or subjects of *the most favored nation*." (16 Stats., 739, 740.)

The stipulated facts show, as has been mentioned, that at the time of the birth of the appellee, in the year 1873, his parents "were *domiciled residents of the United States*, and had established and enjoyed a *permanent domicile and residence therein at the city of San Francisco*," and that they "continued to reside and remain in the United States until the year 1890, when they departed for China." (Rec., p. 10.)

The parents of the appellee, it is stated, "during all the time of their said residence in the United States, as domiciled residents therein, were engaged in the prosecution of business, and were never engaged in any diplomatic or official capacity under the Emperor of China." (Rec., p. 10.)

In the year 1890, the appellee "departed for China upon a temporary visit and with the intention of returning to the United States," and he "did return thereto on the 26th of July, 1890, on the Steamship *Gaelic*, and was permitted to enter the United States by the collector of customs upon the sole ground that he was a native-born citizen of the United States." (Rec., p. 11.)

He remained here, claiming to be a citizen of the United States, until 1894, when he again went to China upon a temporary visit and with the intention of returning to the United States.

He returned to this country in the month of August, 1895,

when his application to be permitted to land at San Francisco was denied upon the sole ground that he was not a citizen of the United States. (*Ib.*)

Ever since his birth the appellee has had but ONE RESIDENCE, namely, a residence in the State of California; he has never changed or lost that residence or gained or acquired another residence, and he there resided, claiming to be a citizen of the United States. (Rec., p. 10.)

He has not, "*either by himself or his parents acting for him*, ever renounced his allegiance to the United States." (Rec., p. 11.)

It is said in the brief of the Solicitor General that "it is not agreed as a fact that Wong Kim Ark was 21 years of age when he returned to the United States in August, 1895."

We do not so understand the record. It is expressly agreed that the appellee was born "*in* the year 1873," and that he returned to the United States "in the month of August, 1895." If he was born on the last day of the year 1873, he was, of course, over twenty-one years of age in the month of August, 1895.

The necessary conclusion from the agreed facts, therefore, is that when Wong Kim Ark returned to the United States from his last temporary visit to China and claimed the right, as a citizen of the United States, to enter the country, in the month of August, 1895, he *was over twenty-one years of age*, and this must be taken to be a *fact* in the case.

The determinate facts in respect to the appellee are, therefore, in effect these:

1. He is a person "born in the United States."

2. His parents, although Chinese subjects and persons of Chinese descent, were, at the time of his birth, domiciled inhabitants of this country, living here under the sanction and protection of the Government and laws of the United

States, and they continued to reside here in that character for seventeen years, at least, after the appellee was born.

Domiciled inhabitants (*subditus temporalis*) are those who, although not having renounced allegiance to their native or original State, have ceased to reside there and have taken a permanent abode in a foreign country, forming a class of inhabitants with regard to civil rights between the subject or citizen and the alien (1 Phillimore, International Law, chap. XVIII, p. 347; Lau Ow Bew *vs.* U. S., 144 U. S., 60). They are described by Sir Robert Phillimore as "*de facto*, though not *de jure*, citizens of the country of their domicile."

In *Carlisle vs. U. S.* (16 Wall., 148) this Court said:

"Aliens domiciled in the United States owe a temporary and local allegiance to the Government of the United States. They are bound to obey all the laws of the country not immediately relating to citizenship during their residence, and are equally amenable with citizens for any infraction of these laws."

3. He never resided in China, but has resided in the State of California uninterruptedly from the time of his birth, claiming to be a citizen of the United States.

4. He never, either by himself or by his parents acting for him, renounced his allegiance to the United States, or claimed to be a subject of the Emperor of China, or an alien of the United States.

5. He has been in China twice during his life, but he went there, on both occasions, for temporary visits only, and with the intention of returning to the United States, which he deemed his own country.

6. He was seventeen years of age when he made his first visit to China, in 1890. It is not stated as a fact that he was taken there by his parents or even accompanied them

to China; but it does appear that he returned during the same year to the United States, and claimed and was accorded by this Government the right to enter the country as a citizen of the United States.

7. He was more than twenty-one years of age when he reached San Francisco, in August, 1895, upon his return from his second visit to China, and claimed the right to land and proceed to his home in California as a citizen of the United States under the Constitution.

It would appear to be an incontestable proposition that the appellee was born "*subject to the jurisdiction*" of the United States, according to the true meaning of those terms in the citizenship clause of the Fourteenth Amendment of the Constitution, and the intention and understanding of those who framed the amendment and proposed it to the legislatures of the States for adoption, and that he was and is a citizen of the United States.

It was one of his rights, privileges, and immunities when he reached San Francisco, in August, 1895, to enter the United States and proceed to his home in California. (Crandall *vs.* Nevada, 6 Wall., 36; Slaughter-house Cases, 16 Wall., 79.)

The intention of the framers of the great Amendment appears to be treated by the Solicitor General in his brief for the United States rather with disdain, and the implied suggestion on the part of the Government, strangely enough, would seem to be that in expounding and giving effect to the article, the Court should proceed upon the view that "its adoption, so far as the ten Southern States were concerned, was of *something more than doubtful validity*, the votes of those States being made by the express terms of the law a condition precedent to the enjoyment and exercise of the right to representation in the Government by which they were

taxed, which derived its just powers from the consent of the governed."

This proposition is preceded in the brief for the Government by the observations that "doubtless the people of the United States have the same power to amend their Constitution which they exercised when that Constitution was ordained and established," and that "if it escaped the inspired sagacity of the framers of that immortal instrument to discern, and remained for the superior virtue and intelligence of the sublime patriots of the reconstruction era to discover, the necessity for a citizenship of the United States, a national citizenship, the power was theirs to propose and with the people to approve and adopt."

The framers of the Amendment were leaders among the statesmen referred to in the brief as "the sublime patriots of the reconstruction era," and no exception can be taken to the observation that if it remained for them to discover the necessity for a national citizenship "the power was theirs to propose and with the people to approve and adopt;" but it is difficult to perceive the object in this case of the particular contention, that the adoption of the amendment was "of *something more* than doubtful validity," or, in other words, invalid, upon the ground asserted in the brief for the Government, unless by the argument it was intended to suggest that some construction should properly be given by this Court to the provisions of the amendment which would fail to promote and give effect to the intention and object of those who framed its declaration in regard to citizenship of the United States and of the States under the Constitution.

Such a suggestion on the part of the counsel of the Government is, of course, inadmissible.

It is true that the framers of the Constitution, unfortunately for the country, failed to perceive, and it was left for the statesmen of the reconstruction period who had carried the Government safely through the great war of the rebel-

lion to discover, the necessity for a definition of citizenship of the United States which should free that citizenship from its disastrous entanglements with State citizenship, for which the country had paid so dearly in costly treasure and still more costly blood ; and, unless the war has not terminated and what is called the "Fourteenth Amendment" is not a valid part of the Constitution of the United States, as maintained by the Solicitor General, the ideas of citizenship entertained by Mr. Calhoun and the other members of the old "State Rights party," as declared in the speech of the great South Carolina leader on the Force bill, in 1833, cited in the Brief for the Government (page 15), are scarcely authority for this Court now and here upon the present question in respect to the citizenship of this appellee.

But we submit, notwithstanding the argument of the Solicitor General, that the dead past long ago buried its dead, and this Court has not erred in supposing that the Fourteenth Amendment is a valid part of the Constitution, and that it is the plain and intended meaning of that article that all persons born upon the soil and subject to the authority and laws of the United States, without distinction of color or race, and irrespective of the nationality, or color, or race, or previous political condition of their parents, are citizens of the United States and of the State wherein they reside.

Another observation in the brief for the Government is that this Court, in the *Slaughter-house Cases* "shattered the idol" of national citizenship, described in the brief as "the offspring of that unhappy period of rabid rage and malevolent zeal when corrupt ignorance and debauched patriotism held high carnival in the halls of Congress," being the same "idol," as we are told, which "'the reconstruction Congress' had placed upon so lofty a pedestal." It is quite clear, however, from the description given by the learned counsel of that unfortunate "idol," that no fragments of it are sought here to be reinstated upon its former "lofty pedestal," if it

should appear, indeed, that the pedestal escaped the fury of this Court, in the *Slaughter-house Cases*, as to which we are not advised in the brief for the Government.

In this particular connection, it is interesting to recall the names of the gentlemen who were the members of the Joint Committee on Reconstruction which framed and reported the Fourteenth Amendment. They were: *On the part of the Senate*, William P. Fessenden, of Maine; James W. Grimes, of Iowa; Ira Harris, of New York; Jacob M. Howard, of Michigan; George H. Williams, of Oregon, and Reverdy Johnson, of Maryland; *on the part of the House*, Thaddeus Stevens, of Pennsylvania; Elihu B. Washburn, of Illinois; Justin S. Morrill, of Vermont; John A. Bingham, of Ohio; Roscoe Conkling, of New York; George S. Boutwell, of Massachusetts; Henry T. Blow, of Missouri; A. J. Rogers, of New Jersey, and Henry Grider, of Kentucky. (Blaine, Twenty Years of Congress, vol. 2, p. 127.)

As we shall see, the present citizenship clause of the Fourteenth Amendment was suggested in the Senate by Mr. Howard, of Michigan, one of the ablest and most accomplished lawyers of that or any other day in this country, on behalf of the Senate members of the Joint Committee on Reconstruction, and the amendment as proposed by Mr. Howard was agreed to in the Senate without division.

(1.) If it could be imagined that the American statesmen who framed and discussed the terms of the Fourteenth Amendment were not themselves aware of the natural and necessary import of the language employed by them in drafting the citizenship clause of the amendment, and that they did not understand that the clause had the effect which has universally been given to it, yet if the clause as framed and expressed does *in fact* bear the meaning which has been attributed to it, and does extend its protecting shield over those whom it is possible to suppose were not thought of when it was conceived and put in form, it is, nevertheless,

to be presumed that the American people, in giving it their approval, knew what they were doing, and intended to ordain what has in fact been decreed by the terms of the amendment.

But the evidence is abundant and decisive that the statesmen and lawyers who framed the amendment and the definition of citizenship, with which it opens, were themselves perfectly aware of the scope and import of the terms of that definition of citizenship, and that they, in fact, intended to include in and embrace by it, as we have said, all persons born in this country, irrespective of the nationality, or race, or color, or previous political condition of their parents.

(2.) The Fourteenth Amendment set up no "caste or oligarchy of the skin" under the safeguard and protection of the National Constitution.

The framers of the article were in full accord with the doctrines on the subject of citizenship in this country, declared by Mr. Bates, as Attorney General, in the celebrated opinion given by him on November 29, 1862, to Mr. Chase, the Secretary of the Treasury, and which was acted upon by that eminent man, the successor of Taney as Chief Justice of the United States, in his administration of the Treasury Department. The citizenship clause of the great Amendment was, in fact, merely declaratory of the doctrines of national law affirmed by the Attorney General in that opinion. Mr. Bates in part said:

"As far as I know, Mr. Secretary, you and I have no better title to the citizenship which we enjoy than the 'accident of birth'—the fact that we happened to be born in the United States. And our Constitution, in speaking of *natural-born citizens*, uses no affirmative language to make them such, but only recognizes and reaffirms the universal principle, common to all nations, and as old as political society, that the people *born* in a country do constitute the nation, and, as individuals, are *natural* members of the body politic.

"If this be a true principle, and I do not doubt it, it follows that every person born in the country is, at the moment of birth, *prima facie* a citizen; and he who would deny it must take upon himself the burden of proving some great disfranchisement strong enough to override the '*natural-born*' right as recognized by the Constitution in terms the most simple and comprehensive, and without any reference to race or color, or any other accidental circumstance.

"That *nativity* furnishes the rule, both of duty and of right as between the individual and the government, is a historical and political truth so old and so universally accepted that it is needless to prove it by authority. Nevertheless, for the satisfaction of those who may have doubts upon the subject, I note a few books, which, I think, cannot fail to remove all such doubts: Kent's Com., vol. 2, part 4, sec. 25; Bl. Com., book 1, chap. 10, p. 365; 7 Co. Rep., Calvin's case; 4 Term Rep., p. 300; Doe *vs.* Jones, 3 Pet., 246; Shanks *vs.* Dupont, *Ib.*, 242, and see a very learned treatise, attributed to Mr. Binney, in 2 Am. Law Register, 193.

"In the United States it is too late now to deny the political rights and obligations conferred and imposed by nativity; for our laws do not pretend to create or enact them, but do assume and recognize them as things known to all men, because pre-existent and natural, and therefore things of which the laws must take cognizance. Acting on this guiding thought, our Constitution does no more than grant to Congress the power 'to establish a *uniform rule* of naturalization.' And so strongly was Congress impressed with the great legal fact that the child takes its political status in the nation where it is born, that it was found necessary to pass a law to prevent the *alienage* of children of our known fellow-citizens who happen to be born in foreign countries. * * * But for that act, children of our citizens who happen to be born at London, Paris, or Rome, while their parents are there on a private visit of pleasure or business, might be brought to the native home of their parents, only to find that they themselves were aliens in their father's country, incapable of inheriting their father's land, and with no right to demand the protection of their father's government. That is the law of birth at the common law of England, clear and unqualified, and now, both in England and America, modified only by statutes, made from time to time, to meet emergencies as they arise. * * *

"It is strenuously insisted by some that 'persons of color,' though born in the country, are not capable of being citizens of the United States. As far as the Constitution is concerned, this is a naked assumption, for the Constitution contains not one word upon the subject. The exclusion, if it exist, must, then, rest upon some fundamental fact, which, in the reason and nature of things, is so inconsistent with citizenship that the two cannot coexist in the same person. Is mere *color* such a fact? It has never been so understood nor put into practice in the nation from which we derive our language, laws, and institutions, and our very morals and modes of thought and, as far as I know, there is not a single nation in Christendom which does not regard the new-found idea with incredulity, if not disgust." ("Citizenship," 10 Opinions of Attorneys General, 383–413.)

Less than four years after this opinion was written the Joint Resolution proposing the Fourteenth Amendment passed both Houses of Congress.

Prejudice of *race* and pretension of *caste* were set aside by the Fourteenth Amendment, which ordained in unequivocal and far-reaching terms that "*all* persons born in the United States and subject to the jurisdiction thereof are citizens of the United States."

This declaration in respect to American citizenship is universal in its application to all the persons described, without regard to differences of *color*, of *race*, or of *descent*.

The language cannot by construction or interpretation be confined to white persons and black persons, to the exclusion of yellow persons, or limited in its application to persons of the Caucasian race and persons of African descent, to the exclusion of persons of Mongolian descent.

All persons, of whatever color or race, born in the United States and subject to their jurisdiction are declared to be, by virtue of such birth alone, natural-born citizens of the United States.

And there can be no doubt that every man who voted for the Amendment in Congress was aware of the far-reaching

character of the terms of the first clause of the first section of the article, and believed that no discord and defilement would or could be introduced into the Constitution of the United States through a denial of citizenship, by construction of that section, to any person born on the soil of the country, on account of his color, or his race, or his descent.

(3.) The position assumed by many who dislike the idea of the citizenship of the American-born children of Chinese descent, generally, has been, as we understand, that the framers of the citizenship clause of the Fourteenth Amendment were not aware of the effect of its terms and had in mind only native-born colored persons of African descent, and that although that clause as framed and expressed does, in fact, bear a broader meaning, and does extend to and include native-born persons of Chinese ancestry, such persons are, nevertheless, to be deemed excluded or excepted from its operation. But if the premises of this argument were true, which we deny, the conclusion that notwithstanding the fact that the language of the first section of the article does extend to and embrace children born here of Chinese parents, the provision is to be construed to except and exclude them from its operation, is plainly inadmissible.

As we have observed, it is to be presumed that the American people, in giving the article their *imprimatur*, understood the scope of its terms, and *intended* to decree what has *in fact* been decreed.

(4.) The untenable character of the theory in regard to native-born persons of Chinese descent residing in this country in their relation to the Fourteenth Amendment, just noticed, seems to have compelled the advocates of the nullification of the amendment, in respect to that class of persons, to resort to the extremity of maintaining the extraordinary proposition that the five words, "*subject to the*

jurisdiction thereof," in the first section of the article, operated to completely *recast* the entire law of this country as to nationality of origin, by one of the most radical and extensive *changes* which it could possibly undergo, and that by those five words it was in effect declared and decreed by the American people, contrary to the immemorial law of England and the United States, that all children born of foreign parents within our territory are aliens and not citizens of the United States, and whether or not, as we suppose it is said, the parents were resident and domiciled in this country at the time of the birth of such children.

We have called this an extraordinary proposition. It is hardly too much to say that it is an amazing proposition; and one of the most wonderful things in connection with it is that it appears to be supposed that the new principle of political nationality which it is said the amendment intended to establish for this Government in this country, is a principle of international law, meaning thereby, as we apprehend, the public law of nations, whereas it is an elementary principle of that system of jurisprudence, as every one having the most superficial acquaintance with it knows, that the subject of political nationality in general is one outside of the domain of international law, and that international law prescribes no rules whatever for the government of independent States in claiming or rejecting persons as their citizens or members of their bodies politic.

This remarkable theory in regard to the Amendment, as we understand it, maintains that the article recasted the law of American citizenship by introducing and establishing in this country the principle of deriving nationality of origin, "natural-born" citizenship, from *descent* alone (*jus sanguinis*) and discarding and excluding from our public jurisprudence the principle by which nationality of origin in this country is derived from birth upon the soil (*jus soli*); so that by and under the Amendment no person born in the United States is a citizen unless, at the time of his birth,

his parents were citizens, although they may then have been domiciled inhabitants of the country, and their offspring may desire to possess the character of a citizen of the United States, and may disavow all allegiance or any political relation to the country of his parents' birth.

It is certain that neither the framers of the Amendment nor the people of the United States ever dreamed that the article effected any such change in the law of original American nationality.

Chief Justice Taney, speaking for the majority of the Court in *Dred Scott vs. Sandford*, said that the power granted to Congress by the Constitution to establish a uniform system of *naturalization* is "confined to persons *born in a foreign country, under a foreign government*," and that Congress could confer the character of citizens upon "those *only* who were born OUTSIDE of the dominions of the United States" (19 How., 417, 418). And Mr. Justice Curtis, speaking for the minority of the Court in that celebrated case, said:

"It is not to be doubted that this is a power to prescribe a rule for the removal of the disabilities consequent on *foreign birth*. To hold that it extends further than this, must do violence to the meaning of the term naturalization, *fixed in the common law* (Co. Lit., 8*a*, 129*a*; 2 Ves. Sen., 286; 2 B. 2 Com., 293), and in the minds of those who concurred in framing and adopting the Constitution. It was in this sense of conferring on an alien and his issue the rights and powers of a *native-born citizen* that it was employed in the Declaration of Independence. It was in this sense that it was expounded in the Federalist (No. 42), has been understood by Congress, by the Judiciary (2 Wheat., 259, 269; 3 Wash., 313, 322; 12 Wheat., 277), and by commentators on the Constitution. (3 Story, Com. on Con., 1–3; 1 Rawle on Con., 84–88; 1 Tucker, Bl. Com. App., 255–259.)

"It appears, then, that the only power expressly granted to Congress to *legislate concerning citizenship* is confined to the removal of the disabilities of FOREIGN birth." (19 How., 578.)

Accordingly, those native persons, who are supposed by this new-fangled theory of the Fourteenth Amendment to be excluded from citizenship of the United States by reason of the alienage of their parents, never *can* become citizens of the United States by naturalization, and they are thus doomed by the Constitution to perpetual alienage in the country of their birth, their homes, and their affections.

And it is clear, as it seems to us, that when the few words in the single sentence of the opinion of Mr. Justice Miller in the *Slaughter-house Cases*, which refers to the particular phrase in the Fourteenth Amendment on which the counsel on the other side rely, in this case, are properly interpreted, it will be found that those words furnish no support to the view maintained here on the part of the Government, that it was the intended effect of the article to establish, as the rule of American nationality, that citizenship by birth or origin of children born in this country depends upon the nationality of their parents; so that the children born here of alien parents, or fathers, whether resident or not in the country, are aliens of the United States.

The words in that opinion which are relied upon by the counsel for the Government are these:

"The phrase 'subject to its jurisdiction' was intended to exclude from its operation children of ministers, consuls, and citizens or subjects of foreign States born within the United States."

The last words of this sentence, "citizens or subjects of foreign States born within the United States," must certainly have been intended by the learned Justice to apply to persons who, though born in the United States, have *expatriated* themselves, and thus become "citizens or subjects of foreign States," and to affirm only that such persons were excluded by the phrase in the amendment referred to from the operation of the article. It can hardly be supposed that by those words the learned

Justice meant to declare that it was the view of this Court that by the true meaning and effect of the amendment all children born in the United States of alien parents were aliens and not citizens of the United States, when probably several millions of our population are or claim to be citizens only from the mere fact of birth on the soil of the country, their parents never having been foreigners who never were naturalized under the laws of the United States, and especially when it had become the settled doctrine of this Court that such native-born persons were themselves not the lawful subjects of naturalization, and could not acquire citizenship under any constitutional legislation of Congress.

(5.) Before closing this preliminary statement it is proper to advert to the effect of any construction of the Fourteenth Amendment by which the citizenship of natives of this country is made to depend upon the citizenship or nationality of their parents, with respect to the political condition, relation, and rights of colored persons of African descent born in the United States.

Under such a construction of the article, persons born in the country being excluded from citizenship unless, at the time of their birth, their parents, or fathers at least, were citizens of the United States, it is difficult to perceive how native colored persons of the African race became or can become citizens of the United States, by virtue of the Amendment, under the doctrine of the *Dred Scott Case*, that free colored persons of African descent, natives of the country, were not and could not be citizens of the United States under the Constitution.

"This decision," as observed by Mr. Justice Miller in the *Slaughter-house Cases*, "while it met the condemnation of some of the ablest statesmen and constitutional lawyers of the country, had never been overruled; and if it was to be accepted as a constitutional limitation of the right of citizenship, then all the negro race who had recently been made

freemen were still not only not citizens, but were incapable of becoming so by anything short of an amendment to the Constitution."

But if, by any principle or rule of nationality declared by the Fourteenth Amendment, persons born in the country are not citizens unless their fathers, at least, were citizens, it would clearly seem that native children of the colored African race, whose fathers were not and could not be citizens, were and are incapable of being or becoming citizens of the United States, under the Amendment, by reason of the original condition of their parents. They could not acquire from their fathers a character which their fathers had not themselves to impart.

If the Amendment has established the rule that the child born in our country follows the political condition or nationality of the parent, the article has simply perpetuated here a race of persons, who are in all legal respects aliens of the United States.

ARGUMENT.

First.

The legislative history of the Fourteenth Amendment discloses that it was in fact the actual intention of the framers of the citizenship clause of the article to include therein the American-born children of Chinese parents, and that it was believed by every one in Congress who participated in the discussion of that provision that those persons were not excluded or excepted from its operation by reason of their color or race or the alienage or political condition of their parents, and that by that clause they were effectually declared to be citizens of the United States.

1. The formal and final report of the Joint Committee on Reconstruction was made to the House of Representatives by Mr. Stevens on Monday, the 30th of April, 1866. It consisted of a Joint Resolution (H. R. No. 127) proposing a Fourteenth Amendment to the Constitution of the United States, the first section of which declared as follows:

"SEC. 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."*

The proposed constitutional amendment came to a vote in the House on the 10th of May, and the result was 128 *ayes* to 37 *noes*.

*The form in which the Fourteenth Amendment (consolidated from various propositions previously discussed) was originally reported from the committee by Mr. Stevens will be found in Mr. Blaine's work, vol. 2, p. 214.

When the Senate, as in Committee of the Whole, on May 23, 1866, proceeded to consider the Joint Resolution, it soon became evident that it could not be adopted in the form in which it came from the House. The first important change was suggested by Mr. Howard, of Michigan, on behalf of the Senate Members of the Joint Committee on Reconstruction, who moved to amend the Joint Resolution by affixing to the first section of the proposed constitutional Amendment these words:

"All persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside."

Congressional Globe, part 3, 1st sess., 39th Cong., pp. 2765, 2869.

Mr. Howard stated that he deeply regretted that the state of the health of Senator Fessenden prevented him from opening the discussion, and proceeded at once to comment upon the first clause of the first section of the House Joint Resolution, which related to the privileges and immunities of citizens of the United States as distinguished from all other persons not citizens of the United States, but contained no definition of the expression, "citizens of the United States."

He, in part, said:

"It is not, perhaps, very easy to define with accuracy what is meant by the expression, 'citizen of the United States,' although that expression occurs twice in the Constitution—once in reference to the President of the United States, and again in reference to Senators, who are likewise to be citizens of the United States.

"Undoubtedly, the expression is used in both those instances in the same sense in which it is employed in the amendment now before us.

"A citizen of the United States is held by the courts to be a person who was born within the limits of the United States and subject to their laws."

After referring to the provision that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States," Mr. Howard said:

"The effect of this clause was to constitute *ipso facto* the citizens of each one of the original States citizens of the United States. And how did they antecedently become citizens of the several States? By birth or by naturalization. They became such in virtue of national law or, rather, of natural law, which recognizes persons born within the jurisdiction of every country as being subjects or citizens of that country. Such persons were therefore citizens of the United States *as were born in the country or were made such by naturalization*, and the Constitution declares that they are entitled, as citizens, to all the privileges and immunities of citizens in the several States. They are, by constitutional right, entitled to these privileges and immunities and may assert this right and these privileges and immunities, and ask for their enforcement whenever they go within the limits of the several States of the Union."

When the Senate, as in Committee of the Whole, on May 30, 1866, resumed the consideration of the Joint Resolution, Mr. Howard stated that there was a typographical error in his first amendment, as the word "State" was printed "States." He said:

"It should be in the singular instead of the plural number, so as to read, 'all persons born in the United States and subject to the jurisdiction thereof are citizens of the United States and of the *State* (not States) wherein they reside.' I move that this correction be made."

The correction was accordingly made. (Congressional Globe, 1st sess., 39th Cong., part 4, pp. 2890 to 2897.)

The debate in the Senate was begun by Senator Howard, who stated expressly and explicitly the intended object and scope and effect of his first amendment to the House Joint Resolution, as follows:

"The first amendment is to section one, declaring that 'all persons born in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside.' I do not propose to say anything on that subject, except that the question of citizenship has been so fully discussed in this body as not to need any further elucidation, in my opinion. This amendment which I have offered is simply declaratory of what I regard as the law of the land already, that every person born within the limits of the United States and subject to their jurisdiction is, by virtue of natural law and national law, a citizen of the United States. This will not, of course, include persons born in the United States who are foreigners, aliens, who belong to the families of ambassadors or foreign ministers accredited to the Government of the United States, but will include every other class of persons. It settles the great question of citizenship and removes all doubt as to what persons are or are not citizens of the United States. This has long been a great desideratum in the jurisprudence and legislation of this country." (*Ib.*, p. 2890.)

It is impossible to doubt, in the presence of this language, that the learned Senator, who was the draftsman of the citizenship clause, on behalf of the Senate members of the Joint Committee on Reconstruction, actually intended by the words employed by him to include in that provision the American-born children of Chinese parents, and that it was not intended by the qualifying phrase, "*subject to the jurisdiction thereof*," to except those persons from the operation of the provision on account of their race, or descent, or the alienage or political condition of their parents.

The intention, by the qualifying phrase, as explained by Mr. Howard, was to except from the operation of the amendment those persons who, although born in the limits of the United States, were regarded by the rules of the public law of nations received in the United States as entitled to an exemption from our local laws and jurisdiction.

The explanation that the provision was not meant to include the children born in the United States of foreign

diplomatic agents, shows necessarily and conclusively that it was not intended by the qualifying phrase in question to except from the amendment the children born in the United States of *other* subjects or citizens of foreign powers, or to introduce in this country any principle or rule that *descent*, and not the *place of birth*, is the primary criterion or source of nationality.

After this explanation of Senator Howard, Mr. Doolittle, of Wisconsin, said:

"I presume the honorable Senator from Michigan does not intend by this amendment to include the Indians. I move, therefore, to amend the amendment—I presume he will have no objection to it—by inserting after the word 'thereof' the words 'excluding Indians not taxed.'"

Senator Howard replied:

"I hope that amendment to the amendment will not be adopted. Indians born within the limits of the United States, and who maintain their tribal relations, are not, in the sense of this amendment, born subject to the jurisdiction of the United States. They are regarded, and always have been, in our legislation and jurisprudence, as being *quasi* foreign nations."

Mr. Cowan, of Pennsylvania, then asked, "[Is the child of the Chinese immigrant in California a citizen? Is the child of a Gypsy, born in Pennsylvania, a citizen?"

Senator Cowan's speech was merely a harangue against the expediency of including those persons in a constitutional definition of citizenship.

Senator Conness, of California, replied promptly and decisively that the proposition before the Senate *was* to incorporate in the Constitution of the United States a provision declaring that "*the children begotten of Chinese parents, in California, shall be citizens*," and that he was in favor of the proposition.

Mr. Conness, in part, said:

"If my friend from Pennsylvania, who professes to know all about Gypsies and little about Chinese, knew as much of the Chinese and their habits as he professes to know of the Gypsies, he would not be alarmed in our behalf *because of the operation of the proposition before the Senate*, or even the proposition contained in the Civil Rights Bill, so far as it involves the Chinese and us.

"The proposition before us, I will say, Mr. President, relates simply in that respect to the *children begotten of Chinese parents in California, and it is proposed to declare that they shall be citizens.* We have declared that by law; *now it is proposed to incorporate the same provision in the fundamental instrument of the Nation.* I am in favor of doing so. I voted for the proposition to declare that *the children of all parentage whatever, born in California, should be regarded and treated as citizens of the United States*, entitled to equal civil rights with other citizens of the United States." (*Ib.*, p. 2891.)

Mr. Conness, after stating from the facts he mentioned that the progeny of the Chinese in this country would necessarily be insignificant, and begging the Senator from Pennsylvania to confine his attention to the Gypsies and give himself no further trouble about the Chinese in California or on the Pacific coast, said:

"Here is a simple declaration that a score or a few score of human beings born in the United States shall be regarded as citizens of the United States, entitled to civil rights, to the right of equal defense, to the right of equal punishment for crime with other citizens; and that such a provision should be deprecated by any person having or claiming to have a high humanity passes my understanding and comprehension. * * *

"We are entirely ready to accept the provision proposed in this constitutional amendment, that the children born here of Mongolian parents shall be declared by the Constitution of the United States to be entitled to civil rights and to equal protection before the law with others." (*Ib.*, p. 2892.)

Not a word of contradiction or doubt was interposed by any Senator to this very distinct statement of the intended meaning and effect of the proposed amendment of Senator Howard in respect to the citizenship of the American-born children of the Mongolian race, as made by the junior Senator from California. His colleague, Mr. McDougall, on the other side in politics, was present and voted on that day in the Senate, and subsequently took part in the debate on the proposed constitutional amendment, but he made no reference to the subject of children born of Chinese parents in the United States, and no word escaped from him suggesting any different view of the intention and effect of that provision.

It appears to have been the universal understanding on both sides of the Senate Chamber that it was the intention and effect of the language of the citizenship clause of the proposed amendment to declare that the American-born children of Chinese subjects were citizens of the United States upon the same and an equal footing with the children of the subjects or citizens of other foreign powers born in the United States.

Senators having apparently agreed that the proposed citizenship clause included the children born here of Chinese parents, and declared them to be citizens, the rest of the debate on that clause related to the amendment of Mr. Doolittle, "excluding Indians not taxed," in respect to which Mr. Howard said that if the amendment was adopted "all that would remain to be done on the part of any State would be to impose a tax upon the Indians, whether in their tribal condition or otherwise, in order to make them citizens of the United States." * * * "The great objection, therefore, to the amendment is, that it is an actual naturalization, whenever the State sees fit to enact a naturalization law in reference to the Indians, in the shape of the imposition of a tax, of the whole Indian population within their limits." (*Ib.*, p. 2895.)

Mr. Howard showed that it could not be maintained that the members of an Indian tribe, although born within the limits of a State and the United States, were "subject to the jurisdiction of the United States," in the sense of his amendment, inasmuch as, agreeably to the settled principles of American jurisprudence, they were not subject to the operation of our laws and the jurisdiction of our courts, but were born under and subject to the authority and government of their tribe or nation. He said:

"I concur entirely with the honorable Senator from Illinois in holding that the word 'jurisdiction,' as here employed, ought to be construed so as to imply a full and complete jurisdiction on the part of the United States, coextensive in all respects with the constitutional power of the United States, whether exercised by Congress, by the executive, or by the judicial department; that is to say, the same jurisdiction, in extent and quality, as applies to every citizen of the United States. Certainly, gentlemen cannot contend that an Indian belonging to a tribe, although born within the limits of a State, is subject to this full and complete jurisdiction. That question has long since been adjudicated, so far as the usage of the Government is concerned.

"The Government of the United States has always regarded and treated the Indian tribes within our limits as foreign powers, so far as the treaty-making power is concerned, and so far especially as the commercial power is concerned, and in the Constitution itself is a provision that Congress shall have power to regulate commerce, not only with foreign nations and among the States, but also with the Indian tribes. That clause, in my judgment, presents a full and complete recognition of the *national character of the Indian tribes.* * * *

"Our legislation has always recognized them as sovereign powers. The Indian *who is still connected by his tribal relation with the government of his tribe is subject for crimes committed against the laws or usages of the tribe to the tribe itself, and not to any foreign or other tribunal.* I believe that has been the uniform course of decision on that subject. The United States have no power to punish an Indian who is

connected with a tribe for a crime committed by him upon another member of the same tribe.

Mr. FESSENDEN: Within the territory?

Mr. HOWARD: Yes, sir. Why? *Because the jurisdiction of the nation intervenes and ousts what would otherwise be, perhaps, a right of jurisdiction of the United States.*" (*Ib.*, p. 2895.)

It thus appears that there was no more intention by this amendment to set aside or abandon our established doctrines in respect to the Indian tribes and their members than there was to uproot or abandon the recognized principle of our law in respect to the effect of the place of birth in the matter of nationality. The amendment was not intended to affect either of those departments of our law. It was a conservative and not a revolutionary measure.

Mr. Johnson, of Maryland, in advocating the amendment proposed by Mr. Doolittle, said that the Indians, "independent of the manner in which we have been dealing with them, are subject to the jurisdiction of the United States, *as is anybody else who may be born within the limits of the United States.*" He stated: "What I mean to say is, that over all the Indian tribes within the limits of the United States the United States *may*—that is the test—exercise jurisdiction."

Senator Williams, of Oregon, said:

"I would not agree to this proposed constitutional amendment if I supposed it made Indians not taxed citizens of the United States; but I am satisfied that, giving to the amendment a fair and reasonable construction, it does not include Indians not taxed. * * *

"Indians not taxed are not even entitled to be counted as persons in the basis of representation under any circumstances. * * *

"I think it perfectly clear, when you put the first and second sections together, that Indians *not taxed* are excluded from the term 'citizens,' because it cannot be supposed for one moment that the term 'citizens,' as employed in these two sections, is intended to apply to Indians who are not even counted under any circumstances as a part of the basis

of representation. I do not believe that Indians not taxed are included, and I understand that to be a description of Indians who maintain their tribal relations and who are not in all respects subject to the jurisdiction of the United States." (*Ib.*, p. 2897.)

As the result of the discussion Mr. Doolittle's amendment was supported by only ten Senators on a call of the *ayes* and *noes*, and the amendment of Mr. Howard was agreed to without a division. (*Ib.*, p. 2897.)

On June 8, 1866, the Senate, as in Committee of the Whole, resumed the consideration of the proposed amendment to the Constitution, when Mr. Henderson, of Missouri, eminent for his abilities and virtues as a lawyer and statesman, discussed the citizenship clause of the first section of the article in a carefully prepared address, showing that the Constitution, as it then was, recognized all free persons born on the soil of the States as natural-born citizens of the United States, and that the proposed amendment was founded upon that principle of our law of nationality. He cited the declaration of Mr. Justice McLean in the *Dred Scott Case:*

"Being born under our Constitution and laws, no naturalization is required, as one of *foreign birth*, to make him a citizen."

Mr. Henderson thought that if the opinion of Mr. Justice Curtis in that famous case was open to criticism at all, it was his conclusion "that it is left to each State to determine what free persons born within its limits shall be citizens of such State, and thereby be citizens of the United States," and the error of this conclusion, he said, was shown in the opinion delivered by Chief Justice Taney. (*Ib.*, pp. 3031–3033.)

Evidently Senator Henderson did not suppose that it was intended by any phrase or word in the amendment as expressed to exclude or except the native-born children of the

subjects or citizens of any foreign States from the operation of the article.

On the same day Mr. Fessenden proposed to amend the amendment of Mr. Howard by general consent by inserting after the word "born" the words "or naturalized," so that the clause should read:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside."

This amendment was agreed to. (*Ib.*, p. 3042.)

On the final passage of the amendment in the Senate the *ayes* were 33 and the *noes* 11. (*Ib.*, p. 3042.)

Among the *ayes* was Senator Sumner, who never would have voted for it if he supposed any doubt could exist as to its including and embracing all native-born persons, for it was his speech on the doctrine of Human Rights, filling forty-one columns of the "Globe," on the 6th of February, 1866, that set the current of public thought in the direction of the Fourteenth and Fifteenth Amendments.*

When the Joint Resolution, as amended by the Senate, was returned to the House on June 13, Mr. Stevens briefly explained the changes, stating that the first section was altered to define who were citizens of the United States and of the States, which he regarded as an excellent amendment, and on the same day the House concurred in all of the Senate amendments by a vote of—*ayes*, 120; *noes*, 32. (*Ib.*, pp. 3148, 3149.)

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* "According to the best testimony now, the population of the earth—embracing Caucasians, Mongolians, Malays, Africans, and Americans—is about thirteen hundred millions, of whom only three hundred and seventy-five millions are 'white men,' or little less than one-fourth; so that in claiming exclusive rights for 'white men' you degrade nearly three-quarters of the Human Family, made in the 'image of God' and declared to be of 'one blood,' while you sanction a Caste offensive to religion, an Oligarchy inconsistent with Republican Government, and a Monopoly which has the whole world as its footstool." (Speech of Mr. Sumner, Cong. Globe, part I, 1st Sess., 39th Cong., p. 687.)

II. The Joint Resolution proposing the Fourteenth Amendment was immediately preceded by the Civil Rights Act of April 9, 1866, "to *protect all persons in the United States in their civil rights, and to furnish the means of their vindication*," passed over the President's veto, which provided that "all persons born in the United States *and not subject to any foreign power*, excluding Indians not taxed, are hereby declared to be citizens of the United States." (14 Stats., 27.)

It is clear not only that both these expressions, "*and not subject to any foreign power*," "*and subject to the jurisdiction thereof*," are the same in meaning, but that each definition, the first as well as the second, was intended to include all persons of domestic birth without regard to the race or the alienage of their parents.

The legislative history of the qualifying phrase, "*and not subject to any foreign power*," as used in the Civil Rights Act, shows specifically that it was intended to except from the general rule of citizenship the children born in the United States of resident foreign diplomatic agents, and was not intended to except the children of Chinese or other aliens born in this country.

The first amendment offered by Senator Trumbull to the original Civil Rights Bill, which, as introduced by him and reported by him from the Senate Judiciary Committee, contained no provision declaring what should constitute citizenship, was in these words:

"All persons of African descent born in the United States are hereby declared to be citizens of the United States."
Congressional Globe, part I, 1st sess., 39th Cong., p. 474.

Mr. Trumbull on the next day, January 30, 1866, offered as a substitute for his own amendment the following:

"All persons born in the United States and not subject to any foreign power are hereby declared to be citizens of the United States without distinction of color." (*Ib.*, p. 498.)

Mr. Guthrie, of Kentucky, and Mr. Howard, of Michigan, both asked whether that would make citizens of all the Indians in the United States. Mr. Trumbull thought not, because we deal with the Indians as foreigners—as separate nations—by treaty and not by law, with certain exceptions, but he was willing to change it so as specifically to exclude Indians.

Mr. Cowan asked whether the amendment "will not have the effect of naturalizing the children of *Chinese* and Gypsies born in this country," to which Mr. Trumbull replied, "*Undoubtedly.*" Mr. Cowan then said that it would be proper to hear the Senators from California on that question. Mr. Trumbull inquired of the Senator from Pennsylvania "*if the children of Chinese now born in this country are not citizens.*" Mr. Cowan thought that they were not, when Mr. Trumbull asked, "Is not the child born in this country of German parents a citizen?" Mr. Cowan's reply was:

"The children of German parents are citizens, but Germans are not Chinese; Germans are not Australians, nor Hottentots, nor anything of the kind. That is the fallacy of his argument."

To this Senator Trumbull replied:

"If the Senator from Pennsylvania will show me in the law any distinction made between the children of German parents and the children of Asiatic parents, I might be able to appreciate the point which he makes; but the law makes no such distinction, and the child of an Asiatic is just as much a citizen as the child of a European." (*Ib.*, p. 498.)

[It is observable that neither of the Senators from California, although both participated in the debate on the bill, controverted this declaration of the Senator from Illinois.]

In fact, Senator Cowan was the only member of either House who referred to the question as to the effect of the Civil Rights Bill in respect to the children of Chinese born in the United States.

Mr. Trumbull, in further discussing the amendment concerning citizenship, on February 1, 1866, said:

"The Senator from Missouri (Mr. Henderson) and myself desire to arrive at the same point precisely, and that is to make *citizens of everybody born in the United States* who owe allegiance to the United States. We cannot make a citizen of the child of a *foreign minister* who is temporarily residing here. There is a difficulty in framing the amendment so as to make citizens of all the people born in the United States and who owe allegiance to it. I thought that might perhaps be the best form in which to put the amendment at one time—'that all persons born in the United States and owing allegiance thereto are hereby declared to be citizens'—but upon investigation it was found that a sort of allegiance was due to the country from persons temporarily resident in it *whom we would have no right to make citizens*, and that that form would not answer. Then it was suggested that we should make citizens of all persons born in the United States, not subject to any foreign power or tribal authority. The objection to that was, that there were Indians not subject to tribal authority who were yet wild and untamed in their habits, who had by some means or other become separated from their tribes, and were not under the laws of any civilized community, and of whom the authorities of the United States took no jurisdiction. Then it was proposed to adopt the amendment as it now stands—that all persons born in the United States not subject to any foreign power, excluding Indians not taxed, shall be citizens." (*Ib.*, p. 572.)

The friends of the Civil Rights Bill, who included on that occasion Senator Reverdy Johnson, of Maryland, accepted Mr. Trumbull's view, that the only persons born in the United States subject to any foreign power, in the meaning of the qualifying phrase, were the children of the representatives of foreign powers residing temporarily in this country, and that by the "Indians not taxed" were meant all who were not counted in the enumeration of the people of the United States, as provided in the Constitution.

Mr. Johnson, of Maryland, suggested that it was advis-

able to omit the words "without distinction of color." He said:

"The amendment as it stands is that all persons born in the United States, and not subject to a foreign power, shall, *by virtue of birth*, be citizens. To that I am willing to consent; and that comprehends *all persons, without any reference to race or color, who may be so born.* That being so, why is it necessary to add to the amendment the words 'without distinction of color'?" (*Ib.*, p. 573.)

Mr. Trumbull thought that the provision concerning citizenship was merely declaratory of what already existed as law, and that the only reason for retaining those words was that there might be no dispute that the word "persons" means "*everybody.*" (*Ib.*, p. 573.)

The language finally adopted for the Civil Rights Bill was:

"All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States."

On April 4, 1866, the Senate took up the veto message of the President, and the discussion was opened by Mr. Trumbull. (Congressional Globe, part 2, 1st sess., 39th Cong., pp. 1755–1761.)

After referring to the opinion of Mr. Bates as Attorney General, given to Mr. Chase in 1862, adopted by Mr. Lincoln's administration, and acted upon since by all departments of the executive government, and also the opinion of Mr. Marcy as Secretary of State, that all free persons born in the United States were citizens, he said:

"'If,' says the President, 'as is claimed by many, all persons who are native born already are, by virtue of the Constitution, citizens of the United States, the passage of the pending bill cannot be necessary to make them such.' That is true, but is the President to learn now for the first time that rule to be found in the very horn-hooks of the law,

that an act declaring what the law is, is one of the most common of acts passed by legislative bodies? My opinion is, such was the opinion of the Attorney General (Mr. Bates), such the opinion of the present Secretary of State (Mr. Seward), such the opinion of Mr. Lincoln's administration in all its departments, such, I believe, to be the prevailing opinion in the United States, that all native-born persons, not subject to a foreign power, are, *by virtue of their birth*, citizens of the United States. But some dispute this, and hence for greater certainty it is proper to pass this law, and the fact of its being a declaratory act is now made a reason for disapproving it by a President. * * * The President also has an objection to making citizens of Chinese and Gypsies. I am told that but few Chinese are born in this country, and where the Gypsies are born I never knew. * * * But, sir, the granting of civil rights does not and never did carry with it (political) rights, or, more properly speaking, political privileges. A man may be a citizen in this country without a right to vote or without a right to hold office."

Mr. Trumbull, continuing, asked, "How is it that every person born in these United States owes allegiance to the Government?" And he proceeded to maintain that this allegiance entitled the native-born person to protection as a citizen of the United States. "Allegiance and protection are reciprocal rights." (*Ib.*, p. 1757.)

It was thus agreed, on this occasion, both by the President and Senator Trumbull—that is to say, by the enemies as well as the friends of the measure—that by the first section of the Civil Rights Bill the children of the Chinese of the Pacific States, the children of the people called Gypsies, the Indians subject to taxation, as well as the entire race designated as black—people of color, negroes, mulattoes, and all persons of African blood—born in this country, were declared to be citizens of the United States.

The constitutional Amendment proposed by the same Congress was intended to cover identically the same ground in respect to citizenship as the Civil Rights Act.

Second.

This brief review of the history of the Fourteenth Amendment and the Civil Rights Act in the same Congress discloses that those who framed and adopted the citizenship clause of the Amendment intended that the phrase "subject to the jurisdiction thereof," in that provision, should create no exception to the declared principle and rule in respect to natural-born citizenship of the United States which would exclude the American-born children of any foreigners on account of the alienage of their parents.

I. The debates in Congress to which we have referred show that the framers of the Amendment were impressed by the fact that neither the Constitution nor laws of the United States, before the Civil Rights Act, expressly defined citizenship of the United States or what constituted a citizen of the United States, although it is clear they regarded the former as descriptive of membership of the national body politic and the latter as expressive only of the political *status* or quality of a person in his relation to the United States.

Both Mr. Howard, the author of the citizenship clause of the Amendment, and Mr. Trumbull, the draftsman of the Civil Rights Bill, declared that citizenship under the Constitution had no necessary dependence on or coexistence with the right of suffrage, which they said was "merely the creature of law."

It was observed also in the course of the discussions that, while the Constitution contained no express definition of the word "citizen," it nevertheless used the term as a word the meaning of which was already established and well understood, and recognized a class or description of citizens of the United States called "*natural-born*" citizens, consti-

tuted such from the fact of their having been "born" within the United States, without expressly declaring what persons so born were or were not "natural-born" citizens, and also a class or description of citizens of the United States who were *not* "natural-born," but were made citizens by the process of naturalization, a process concededly applicable under the Constitution only to persons who were not "born" within the United States, but were born outside of their dominions.

As has been said, it was universally agreed when the Constitution was adopted, and it was understood by the framers of the Fourteenth Amendment, that the power given to Congress to prescribe an uniform rule of naturalization was merely a power to provide for the removal of the disabilities consequent on alienage by *foreign birth*, and to confer on an alien—that is to say, a person born out of the jurisdiction of the United States—the rights and powers of a "natural-born" citizen.

"No person shall be a Representative who shall not have * * * been seven years *a citizen* of the United States."

"No person shall be a Senator who shall not have * * * been nine years *a citizen* of the United States."

"No person except a *natural-born citizen*, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President."

"The Congress shall have power to establish an uniform rule of naturalization."

It appears from the debates that these provisions of the Constitution were constantly in the minds of the framers of the citizenship clause of the Fourteenth Amendment, and it is with reference to them and the principles of law to which they referred, as understood by the framers of that clause, that the provision contained in it must necessarily be interpreted.

As the Constitution contemplated the existence of a description of citizens called "natural-born" citizens, and that

citizenship of the United States was impressed upon persons by birth within the United States, without declaring in terms what native-born persons were, from the fact of their birth within the country, "natural-born" citizens of the United States, it was proposed by the Amendment to declare expressly that *all* persons "born" in the United States and subject to its jurisdiction, are, *by the fact of their having been so born*, citizens of the United States—that is to say, natural-born citizens of the United States.

The great object of the citizenship clause of the Amendment, in the minds of its framers, was to set at rest any controversy or doubt as to the rule of original and natural nationality under the Government of the United States, and its application, by expressly declaring that *all* persons born within the United States and subject to their laws, are, by virtue of the *place of their birth*, natural-born citizens of the United States, agreeably to the "principle of public law" recognized by the Constitution, as observed by Mr. Justice Curtis, that "birth on the soil of a country both creates the duties and confers the rights of citizenship." (19 How., 578.)

II. The discussions in the Senate to which we have referred, show that the framers of the citizenship clause understood that the provision, as expressed by them, was only *declaratory* of the principle and rule recognized, as they believed, by the Constitution, that all free persons, of whatever race or parentage, born in this country and subject to its laws, are, by reason of their place of birth, natural-born citizens of the United States.

It was believed that the Constitution expressly recognized the fact of birth on the soil of the country and not descent as the test and rule for determining nationality.

Any idea that these statesmen and lawyers of America proposed to introduce in this country, under our Constitution, the rule of the Code Napoleon or any continental code is one of the wildest of dreams, and not a word they said supports such a theory.

(*a.*) Senator Howard, as we have seen, in introducing the citizenship clause, on May 23, 1866, as an addition to the first section of the House Joint Resolution, stated that the expression citizen of the United States in the Constitution and in the amendment proposed by him was used, in his view, in the same sense; and he said:

"A citizen of the United States is held by the courts to be a person who was *born within the limits of the United States and subject to their laws.*"

This is, in substance, the definition of a natural-born citizen of the United States, under the Constitution, adopted by Vice-Chancellor Sandford in the celebrated case of *Lynch vs. Clark* (1 Sand. Ch., 656, 663), decided in 1844.

This case, no doubt, was in the mind of the Senator; and it adjudged that the question, Who is a citizen of the United States? was determinable, under the Constitution, by reference to the *English common law*, which at the time of its adoption was, to a greater or less extent, recognized as the law of all the States; and it was expressly determined that a person born within the limits and jurisdiction of the United States was a natural-born citizen without regard to the political condition or nationality of his parents.

The language of Senator Howard shows that he used the phrase, subject to the "jurisdiction" of the United States, in his amendment, as equivalent to, subject to the "laws" of the United States, and he had no intention that

the expression in his amendment should have any more extended or different meaning.

It is manifest also from the language of Mr. Howard that he regarded the *place of birth*, and not *descent*, as the natural and proper test of citizenship or nationality.

"The effect," he said, "of this clause of the Constitution (article IV, section 2) was to constitute *ipso facto* the citizens of each one of the several States citizens of the United States. And how," he asked, "did they antecedently become citizens of the several States? By *birth* or *naturalization*. They became such in virtue of national law, or rather of natural law, which recognizes persons born within the jurisdiction of every country as being subjects or citizens of that country. Such persons were, therefore, *citizens of the United States* as were *born in the country* or were *made* such by naturalization."

(*b*.) The same Senator, on the day his amendment passed the Senate, said again that his proposition was simply declaratory of the existing law of the land, as he understood it, and that by virtue of natural law and national law every person born within the limits of the United States, and subject to their jurisdiction, was a citizen. This, he stated, would not include persons born in the United States belonging to the families of foreign ambassadors or ministers accredited to the Government of the United States. No member of the Senate questioned the correctness of this view of the amendment.

Mr. Reverdy Johnson, of Maryland, who had argued the *Dred Scott Case*, and who was present in the Senate, did not controvert this construction of the measure.

(*c*.) When the Senate, on the same day, passed to the question of "Indians not taxed," Mr. Howard stated again, in effect, that by "subject to the jurisdiction thereof" was meant subject to the authority of the laws of the United

States, from the operation of which tribal Indians were exempted, and they were, therefore, necessarily excepted, he said, from the operation of his amendment.

(*d.*) It is apparent also from the discussion in the Senate on the Civil Rights Bill that the same qualification, expressed only in different language in that bill, was meant to create no exception to what was regarded by the authors of the bill as the rule under the Constitution for determining the citizenship of children born in this country—namely, the locality of their birth—and that it was supposed that the persons born in the United States, "not subject to a foreign power," within the meaning of that bill, were the children of diplomatic agents of foreign governments temporarily residing in the United States, who were exempt by positive international law from our jurisdiction and laws.

It has been seen from the debates on the Civil Rights Bill that Senator Trumbull was in complete accord with the principles in relation to American citizenship declared and maintained by Attorney General Bates in the opinions given by him, in 1862, to the Secretary of the Treasury and the Secretary of State, during the first term of President Lincoln's administration, and there can be no just doubt that it was distinctly intended by their framers that the Civil Rights Bill as well as the citizenship clause of the Fourteenth Amendment should embody and declare the doctrine of those opinions, accepted as law by the Executive Department of the Government, that national citizenship and alienage were national subjects, and that birth on the soil, and not descent, was the basis and criterion of citizenship of the United States under our Constitution. (Citizenship, 10 Opinions Att'ys Gen'l, 382; Case of Mrs. Preto and Daughter, *Ib.*, 321; Citizenship of Children Born in the United States of Alien Parents, *Ib.*, 328.)

In his leading opinion on this subject from which we have already quoted, Mr. Bates said:

"In my opinion, it is a great error, and the fruitful parent of errors, to suppose that *citizens* belong exclusively to republican forms of government. English subjects are as truly citizens as we are, and we are as truly subjects as they are. Imperial France, following imperial Rome, in the text of her laws, calls her people citizens (*Les Codes Français*, Book 1, title 1, cap. 1, and notes). And we have a treaty with the present Emperor of the French stipulating for reciprocal rights in favor of the *citizens* of the two countries respectively.

"It is an error to suppose that citizenship is ever hereditary. It never 'passes by descent.' It is as original in the child as it was in his parents. It is always either born with him or given to him directly by law." (10 Ops., 399.)

In the *Case of Mrs. Preto and Daughter*, it appeared that the former was born in New Jersey and became the wife of a Spanish subject by marriage in the city of Washington, and that the daughter was born in that city. Mr. Bates, in his opinion to Mr. Seward, held that both were citizens of the United States. "It is clear," he said, "that Miss Griffith did not lose her American citizenship by the fact of marrying Mr. Preto; and, to my mind, it is equally clear that her daughter, born here in Washington, was born an American citizen." (*Ib.*, p. 323.)

In his third opinion, Mr. Bates said to the Secretary of State that children born in the United States of alien parents, who were never naturalized, are "native-born" citizens of the United States. "I might sustain this opinion," he said, "by a reference to the well-settled principle of the common law of England on this subject; to the writings of many of the earlier and later commentators on our Constitution and laws; to the familiar practice and usage of the country in the exercise of the ordinary rights and duties of citizenship; to the liberal policy of our Government in extending and recognizing these rights and

enforcing these duties; and, lastly, to the *dicta* and decisions of many of our national and State judicial tribunals; but all this has been well done by Assistant Vice-Chancellor Sandford, in the case of Lynch *vs.* Clarke (1 Sand. Ch. Rep., 583), and I forbear. I refer to his opinion for a full and clear statement of the principle, and of the reasons and authorities in its support. Of course, you will understand that I do not affirm the rule in such exceptional cases as the birth of the children of foreign ambassadors and the like." (*Ib.*, pp. 328, 329.)

The first and principal opinion of Attorney General Bates on "Citizenship," given to Secretary Chase, in November, 1862, was, in fact, the forerunner of the Civil Rights Bill and the citizenship clause of the Fourteenth Amendment.

Third.

By the common law of England, nationality of origin depends upon and is dictated by the place of birth and not descent; and that was the law of all the States at the time of the Revolution and the adoption of the Constitution.

I. As has been said, primarily it is a question for the municipal law of each nation to decide, whether a given individual is to be considered a subject or citizen or an alien of that nation; and every sovereign State has the undoubted right to impress by its municipal law the quality or character of a subject or citizen upon the offspring of a subject or citizen of another power who may be born within its territorial jurisdiction. This right is a necessary concomitant of the doctrine of the independence of a sovereign State.

The law of nations expresses no preference whatever for the rule established by affirmative municipal legislation in some countries by which a child follows the nationality or citizenship of his parent.

It is left open to States by international law to act as they like in respect to their rules of political nationality.

By the law of France, anterior to the Revolution, as we understand, all persons born on French soil were Frenchmen, whether their parents were Frenchmen or foreigners, and mere birth within the kingdom gave them the rights of natural-born subjects, independently of the origin or residence of their parents. (Pothier, Traité des Personnes et des Choses, partie 1, tit. 2, sec. 1: see Drummond's case, 2 Knapp P. C. C., 308, for the old French law of allegiance.)

It was formerly, indeed, what the eminent French jurist, M. Demolombe, calls "the rule of Europe"—"*règle Européenne*"—that the nationality of children born of the subjects of one power within the territory of another was

dictated by the place of their birth, in the view at least of the State of which they were natives. (Cours de Code Napoleon, liv. 1, tit. 1., chap. 1, Nos. 146, 163.)

By the Code Napoleon, March 8, 1803, it was provided that the child born in France should follow the nationality of his father, but that the *place of birth* should have effect to give to the child of an alien, born on French soil, the right, within a year following the attainment of his majority, to claim French citizenship on making a declaration and fixing his domicile in France. (Code Napoleon, "Code Civil," liv. 1, c. 1.)

As we understand the Code Napoleon, it makes the naturalization of the child of a foreigner born in France, who, during the year following the attainment of his majority, elects to be French, *date back to the time of his birth.*

II. By the English common law all persons born within the dominions of the Crown, no matter whether of English or foreign parents, and in the latter case, whether the parents were settled or merely temporarily sojourning in the country, were natural-born British subjects, except the children of foreign ambassadors (who were exempt and enjoyed immunity from the territorial jurisdiction) or a child born to a foreigner during the hostile occupation of British territory.

[The exception in favor of the children of foreign ambassadors resulted from the immunity of such diplomatic agents fro the local territorial jurisdiction, "incorporated with the positive law of nations and established, no doubt, before the age of Elizabeth" (1 Hallam, Constitutional History of England, 165; Hall, International Law, 4th ed., § 50 to 180). Mr. Hall says: "For some purposes, also, a diplomatic agent is distinctly considered as being not so much privileged as *outside the jurisdiction.* Thus, children born to him within the State to which he is accredited are not its subjects, notwithstanding that all persons born of foreigners within its territories may be declared by its laws to be so."]

In *Calvin's Case*, with reference to natural-born subjects, it is said:

"There be regularly (unless it be in special cases) three incidents to a subject born: 1. That the parents be under the actual obedience of the King; 2. That the place of his birth be within the King's dominions; and, 3. The time of his birth is chiefly to be considered, for he cannot be a subject born of one kingdom that was born under the ligeance of a king of another kingdom, albeit afterwards one kingdom descend to the King of the other. 1. For the first, it is termed actual obedience, because the King of England hath absolute right to other kingdoms or dominions, as France, Aquitain, Normandy, etc., yet, seeing the King is not in actual possession thereof none born there since the Crown of England was out of actual possession thereof, are subjects to the King of England. 2. The place is observable, but as so many times ligeance or obedience, without any place within the King's dominions, may make a subject born; but any place within the King's dominions without obedience can never produce a natural subject. And therefore, if any of the King's ambassadors in foreign nations have children there of their wives, being English women, by the common laws of England they are natural-born subjects, and yet they are born out of the King's dominions. (Cr. Car., 601, 602. March, 91. Jenk. Cent., 3.) But if enemies should come into any of the King's dominions and surprise any castle or fort and possess the same by hostility and have issue there, that issue is no subject to the King, though he be born within his dominions; for he was not born under the King's ligeance or obedience. But, 3, the time of his birth is of the essence of a subject born; for he cannot be a subject to the King of England unless he was under the ligeance and obedience of the King." (Lord Coke's Report of Calvin's Case, State Trials, vol. 2, p. 639.)*

* "It was held by twelve judges out of fourteen, in *Calvin's Case*, that the *post-nati*, or Scots born after the King's accession, were natural subjects of the King of England. This is laid down, and irresistibly demonstrated by Coke, the chief justice, with his abundant legal learning. * * * There are many doubtful positions scattered through the judgment in this famous case. Its surest basis is the long series of precedents, evincing that the natives of Jersey, Guernsey, Calais, and even Normandy and Guienne, while these countries appertained to the Kings of England, though not in right of its Crown, were never reputed aliens." (1 Hallam, Constitutional History of England, p. 306, note 1.)

The rule of the common law is stated by the Royal Commission appointed in England in 1868 to inquire and report on the laws of naturalization and allegiance as follows:

"All persons, of whatever parentage, born within the dominions and allegiance of the Crown, are, by the Common Law, natural-born British subjects. All persons, on the other hand, of whatever parentage, born beyond its dominions and out of its allegiance, were by the Common Law regarded as aliens." (Naturalization Commission Report, VII.)

As early as the 17th of Edward III (1343), doubts having arisen as to whether even the King's sons born without the realm could inherit, the question was brought before the Lords, who replied that the King's sons could inherit, wherever born, but that, with regard to the children of other persons, there were great difficulties in deciding the question.

The act of 25 Edward III (1350), Stat., 2, was accordingly passed on this subject ("*A statute for those that be born beyond sea*"), providing that all children inheritors "which from henceforth shall be born without the ligeance of the King, whose fathers and mothers at the time of the birth be and shall be at the faith and ligeance of the King of England, shall have and enjoy the same benefits and advantages, to have and bear the inheritance within the same ligeance, as other inheritors aforesaid in time to come; so always the mothers of such children do pass the sea by the license and wills of their husbands."

Mr. Horace Binney, who was no doubt the author of the learned article, published in 1854, in 2 American Law Register, p. 193, entitled, "*The alienigenæ of the United States*," which induced the passage by Congress of the act of February 10, 1855, was of opinion that the act of 25th Edward III introduced a new rule, and was not simply *declaratory* of the previous law, and that by the common-law principle which was in force in the United States, under the Consti-

tution, the children of American families born in *foreign countries* of native-born American fathers *and* mothers, fathers *or* mothers, were *aliens* of the United States. Mr. Binney said:

"The common-law principle of allegiance was the law of all the States at the time of the Revolution and at the adoption of the Constitution, and by that principle the citizens of the United States are, with the exceptions before mentioned, such only as are either *born* or *made* so, born *within the limits and under the jurisdiction of the United States*, or naturalized by the authority of law, either in one of the States before the adoption of the Constitution or since that time, by virtue of an act of Congress."

It is to be observed that Sir Alexander Cockburn, late Lord Chief Justice of England, was of opinion, agreeing with Mr. Binney, that the statute of 25th Edward III established a new rule and was an enabling act. "The view that the act was only *declaratory* of the common law," says Lord Cockburn, "is hardly consistent with its language, which is prospective, and refers only to children which 'from henceforth shall be born;' and it has been pertinently observed, that if the statute had only been declaratory of the common law, the subsequent legislation on this subject would have been unnecessary." (Cockburn on Nationality, p. 9.)

This seems to have been the opinion, also, of the Royal Commission of 1868, from the statement in their report of the persons deemed by the common law of England to be "natural-born" British subjects, which include those only who were born within the dominions and allegiance of the Crown.

The view of the great lawyer of Philadelphia upon this technical question of English law thus appears to be sustained by the opinions of these eminent English jurists.

The majority of the Royal Commission of 1868, among whom were such jurists and publicists as Sir Travers Twiss,

Sir Robert Phillimore, and Sir Roundell Palmer, advised the retention by Great Britain of the rule of the common law by which the child born in England of an alien parent is regarded as a British subject, but that provisions should be made for enabling children born within the dominions of the Crown of alien fathers to be registered during their minority as aliens, and permitting the child, if not so registered during his minority, to register himself as an alien before exercising or claiming any right or privilege as a British subject.

The Commissioners said that while the rule which impresses on persons born within the dominions of the Crown the character of British subjects was open to some objections, it had, on the other hand, solid advantages.

"It selects as the test a fact readily provable, and this, in questions of nationality and allegiance, is a point of material consequence. It prevents troublesome questions in cases where the father's nationality is uncertain, and *it has the effect of obliterating speedily and effectually disabilities of race*, the existence of which within any community is generally an evil, though to some extent a necessary evil. Lastly, we believe that of the children of foreign parents born within the dominions of the Crown a large majority, would, if they were called upon to choose, elect British nationality." (Naturalization Commission Report, VIII.)

By the law of England as to nationality of origin, all persons born in the dominions of the Crown, whether of British or foreign parents, with a few exceptions, including the children of foreign diplomatic agents in Great Britain, and all persons being the children or grandchildren of British parents, though born within the dominions of a foreign State, are to all intents and purposes British subjects.

The Naturalization Act of 33 Vict., ch. 14 (May 12, 1870), provides that "any person who by reason of his having been *born* within the dominions of Her Majesty is a *natural-*

born subject, but who also at the time of his birth became, under the laws of any foreign State, a subject of such State, and is still such subject, may, if of full age and not under any disability, make a declaration of alienage in manner aforesaid, and from and after the making of such declaration of alienage such persons shall *cease* to be a British subject. Any person who is born out of Her Majesty's dominions of a father being a British subject may, if of full age and not under any disability, make a declaration of alienage in manner aforesaid, and from and after the making of such declaration shall cease to be a British subject." (Copy of the Act, Foreign Relations of the U. S., 1870, p. 435; Law Reports, Statutes, vol. V, 1870, p. 166.)

A child born of an alien in England is a *natural-born British* subject, with the right to make such a declaration as the statute provides.

Fourth.

The declaration of the Amendment that all persons born in the United States and subject to the jurisdiction thereof are "citizens of the United States"—that is to say, natural-born citizens—must necessarily be construed in reference to the words "citizen of the United States" and "natural-born citizen of the United States," as used in the Constitution, which unquestionably referred to and were intended to be defined by reference to the common-law principle of allegiance and alienage in force in all the States at the adoption of the Constitution. The Amendment, therefore, by its legal construction and effect, is only declaratory of the rule that every person, whether of American or foreign parents, born within our territorial jurisdiction, is a natural-born citizen of the United States.

I. The Amendment, conformably to the original Constitution, contemplates two sources of citizenship, *birth in* the United States and naturalization by the United States, and its general object is to make citizens and not to *unmake* them—not to *take away* the character of citizens where the law as it stood before would have conferred it. It manifestly was not intended to *recast* the law of original nationality on the lines of any foreign Code and *denationalize* persons invested with citizenship under any existing law in respect to our nationality of origin.

As has been said, it is universally agreed that to make a person of *domestic* birth a citizen is not naturalization, and cannot be brought within the exercise of the power to "naturalize." (Authorities *supra;* 2 Story Const., 44.)

No exceptions are *expressed* to the general rule of native-born citizenship of the United States declared by the Article, that every person of *domestic* birth is a natural-born citizen of the United States, and if any exceptions exist, it is only

by *implication* from the phrase "subject to the jurisdiction thereof," which is curiously supposed on the other side to operate by way of *repugnancy* to the rule of the Article, so as to make it declare that a person of domestic birth is a citizen of the United States if his parents are citizens, and an alien if his parents are alien.

II. By the Constitution, article I, section 2, § 2, and section 3, § 3, Senators and Representatives were required to have been for several years citizens of the United States *before the United States existed, except as a Confederacy*, and article 2, section 1, § 4, speaks of a "natural-born citizen of the United States" and "a citizen of the United States, *at the time of the adoption of this Constitution*," recognizing the difference between a natural-born citizen and a citizen of the United States.

By article 1, section 8, § 4, Congress was empowered, by a uniform rule, to *make* citizens—to remove the political disabilities of *aliens*, and, of course, it was assumed that Congress would know who were citizens by birth and who were aliens by birth under the Constitution.

By article 4 of the Articles of the Confederation, in effect, the citizens of each State were entitled to all the privileges and immunities of the "free citizens" in the several States, and, under the article, the citizens of each State, by birth or naturalization, became, politically, citizens of the United States and were recognized as such by the Constitution, which required Representatives and Senators (even in the first Congress) under it to have been for many years *citizens* of the United States.

The effect of the corresponding provision of the Constitution (article 4, section 2), that "the citizens of each State shall be entitled to all privileges and immunities of *citizens in the several States*," in the first instance, was to bring within the fold of citizenship of the United States, and thus of each and every State, all persons who, at the time of the

adoption of the Constitution, were, by birth or naturalization, citizens of any of the States. (3 Story, Constitution, 674, '5, § 1500.)

The provision also secured the privileges and immunities of citizens in all the States to persons who were in the future citizens of the United States.

The Constitution thus assumed that persons are natural-born citizens or aliens of the United States, under and by the operation of a principle or rule of law in respect to nationality by birth or origin, recognized and adopted by it, and coeval with the Union.

III. Now, there can be no just doubt, both upon sound doctrine and authority, that, while the Constitution of 1789 contained no express definition of citizenship declaring who were natural-born citizens and who were aliens of the United States, it recognized and adopted as the law of that subject, under the Constitution, the common law or the principle of the common law of allegiance and alienage, by which birth on the soil of a country both creates the duties and confers the rights of citizenship; that allegiance and natural-born citizenship spring from the *place of birth*, and not from *descent* or the nationality of parents.

1. It is universally admitted that free persons born within either of the colonies before the Declaration of Independence were by the common law, in force in all the colonies, subjects of the King, and that by the Declaration, and the consequent acquisition of sovereignty by the several States, all such persons ceased to be *subjects* and became *citizens* of the several States, except so far as some of them were disfranchised by the legislative power of the States or availed themselves of the right to adhere to the British Crown, and thus to continue British subjects. (McIlvain *vs.* Coxe's Lessee, 4 Cranch, 209; Inglis *vs.* Sailors' Snug Harbor, 3 Pet., 99; Shanks *vs.* Dupont, *Ib.*, 242.)

Agreeably to the decisions of this Court in the cases above cited, the term "citizen" as used in our jurisprudence is precisely analogous to "subject" in the common law, and the change of phrase entirely resulted from the change of government. The transfer of the sovereignty from one person to the collective body of the people effected no change in the law in respect to native allegiance and nationality. (State *vs.* Manuel, 4 Dev. & Batt., 26; Ainslee *vs.* Martin, 9 Mass., 458.)

Mr. Justice Story, in his opinion in the leading case of *Inglis vs. The Sailors' Snug Harbor* (3 Pet., 155), examined the doctrine of nationality at the common law and applied it to the question of the citizenship or alienage of Bishop Inglis, born in New York in 1776, as derived from his place of birth, which was the controlling matter. The learned judge said:

"The rule commonly laid down in the books is, that every person who is born within the ligeance of a sovereign is a subject, and, *e converso*, that every person born without such allegiance is an alien. This, however, is little more than a mere definition of terms, and affords no light to guide us in the inquiry, What constitutes allegiance, and who shall be said to be born within the allegiance of a particular sovereign; or, in other words, what are the facts and circumstances from which the law deduces the conclusion of citizenship or alienage? Now, allegiance is nothing more than the tie or duty of obedience of a subject to the sovereign under whose protection he is; and allegiance by birth is that which arises from being born within the dominions and under the protection of a particular sovereign. Two things usually concur to create *citizenship*—first, *birth locally within the dominions of the sovereign; and secondly, birth within the protection and obedience, or, in other words, within the ligeance of the sovereign.* That is, the party must be born within a place where the sovereign is at the time in full possession and exercise of his power, and the party must, also, at his birth, derive protection from, and consequently owe obedience or allegiance to, the sovereign, as such, *de facto.* (See Calvin's Case, 7 Co., 1;

Doe *vs.* Jones, 4 Term Rep., 300; 1 Bl. Comm.) There are some exceptions which are founded upon peculiar reasons, and which, indeed, illustrate and confirm the general doctrine. Thus, a person who is born on the ocean is a subject of the prince to whom his parents then owe allegiance; for he is still deemed under the protection of his sovereign, and born in a place where he has dominion in common with all other sovereigns. So the children of an ambassador are held to be subjects of the prince whom he represents, although born under the actual protection and in the dominions of a foreign prince."

And in respect to the demandant the learned judge said:

"If he was born after the 4th of July, 1776, and before the 15th of September, 1776 (when the British took possession of New York), he was *born an American citizen*, whether his parents were at the time of his birth British subjects or American citizens. Nothing is better settled at the common law than the doctrine that the children even of aliens born in a country, while the parents are resident there under the protection of the Government, and owing a temporary allegiance thereto, are subjects by birth. If he was born after the 15th of September, 1776, and his parents did not elect to become members of the State of New York, but adhered to their native allegiance at the time of his birth, then he was born a British subject."

2. It is equally well known that after the Declaration of Independence and before the Constitution the common-law principle of allegiance continued to be the law of all the States, and as such governed the subject of *natural-born* citizenship and alienage, and that natural-born citizenship of the several States was *native-born* citizenship and nothing else.

The learned Assistant Vice-chancellor, in *Lynch vs. Clarke*, after showing that at the Declaration of Independence by the law of each and all of the thirteen States the common-

law principle was the recognized rule of citizenship and alienage, observed:

"This continued unchanged to the time when our National Constitution went into full operation. There is no evidence of any alteration of the rule in any of the States during the period that intervened; and the references which will be made under another head show conclusively that there had been no intermediate change in their policy."

And, after referring to early State constitutions and statutes, he observed that—

"The universal understanding of the representatives of the people of the States in establishing their fundamental and statutory laws was that every person born within their territory was by that fact alone a citizen, and in some of the States the recognition of the doctrine is express."

3. The principle of the common law that allegiance and citizenship spring from the place of birth, and not from descent or parentage, passed to the United States under the Constitution, and there it has ever since remained.

The court in *Lynch vs. Clarke* forcibly observed:

"The only standard which then existed *of a natural-born citizen* was the rule of the common law, and no different standard has been adopted since. * * * Moreover, the absence of any avowal or expression in the Constitution of a design to affect the existing law of the country on this subject is conclusive against the existence of such design. It is inconceivable that the representatives of the thirteen sovereign States, assembled in convention for the purpose of framing a confederation and union for national purposes, should have intended to subvert the long-established rule of law governing their constituents on a question of such great moment to them all, without solemnly providing for the change in the Constitution; still more that they should have come to that conclusion without even once declaring their object."

(*a.*) Such was the opinion of Chancellor Kent, who followed the English law in dividing the people of the United States politically into *aliens* and *natives:* "(1) Natives are all persons born within the jurisdiction and allegiance of the United States," and "(2) an alien is a person born out of the jurisdiction and allegiance of the United States."

One of the exceptions referred to by the chancellor includes the children of public ministers abroad, who, as he says, owe not even a temporary allegiance to any foreign power. (2 Kent Com., 39, 50.)

And the learned chancellor states, in a note, his opinion that in the United States the right of citizenship, as distinguished from alienage, is a national right, character, or condition, and does not pertain to the individual States, separately considered. The question is governed by the principle of the common law in respect to the allegiance of all persons born within the King's dominions, which "was the law of the colonies, and became the law of each and all of the States, when the Declaration of Independence was made, and continued so until the establishment of the Constitution of the United States, when the whole exclusive jurisdiction of this subject of citizenship passed to the United States, and the same principle has there remained."

Mr. Rawle was of the same opinion: "Every person born within the United States, its territories or districts, *whether the parents are citizens or aliens*, is a *natural-born* citizen." (Rawle's Views of the Constitution of the United States, 86.)

Chief Justice Marshall, speaking for the Court, in *Murray vs. Charming Betsey* (2 Cr., 64, 120), said:

"Whether a person *born* within the United States, *or* becoming a *citizen* according to the established laws of the country, can divest himself absolutely of that character otherwise than in such manner as may be prescribed by law, is a question which it is not necessary at present to decide." (See also *The Santissima Trinidad*, 7 Wheat, 283, 257.)

The question assumed that birth in the United States conferred national citizenship.

(*b.*) In 1844 the case of *Lynch vs. Clarke*, to which reference has been made, was decided by the Court of Chancery of New York in an opinion of remarkable ability delivered by Assistant Vice-chancellor Sandford, holding that Julia Lynch, born in the city of New York, in 1819, of alien parents, during their temporary sojourn in New York, was a native-born citizen and not an alien of the United States, and capable of inheriting the real estate in controversy.

Her parents were British subjects, domiciled at the time of her birth in Ireland. They came to this country in 1815 as an experiment, without any settled intention of abandoning their native country or of making the United States their permanent abode. They never concluded to remain here permanently, and after trying the country returned home in 1819, taking their daughter with them, and she continued to reside in Ireland until she came to this country, after her father's death, with her uncle, Thomas Lynch, in 1834, when she was about fifteen years of age.

"Her right to inherit, as the heir of Thomas Lynch, must be tested by the state of allegiance existing at his death, when the descent was cast. It is evident, therefore, that the right depends upon her alienage or citizenship at the time of her departure from this country in her mother's arms, in the year 1819; for no act intervened between that time and the death of Thomas, which could alter her political state or condition."

The court entertained no doubt but that Julia Lynch by our law was a citizen of the United States when Thomas Lynch died.

Judge Sandford said:

"In my judgment, there is no room for doubt but that to a limited extent the common law (or the *principles* of the common law, as some prefer to express the doctrine) pre-

vails in the United States as a system of national jurisprudence. To what *extent* it is applicable I need not hazard an opinion, either in general terms or in particular instances, beyond the case in hand. But it seems to be a necessary consequence from the laws and jurisprudence of the colonies and of the United States under the Articles of Confederation; that in a matter which, by the Union, has become a national subject, to be controlled by a principle coextensive with the United States; in the absence of constitutional or congressional provision on the subject, it must be regulated by the *principles of the common law*, if they are pertinent and applicable."

The Solicitor General expresses his surprise that the Chancellor held that the portion of the sacred soil of New York in controversy *passed by descent from an alien to Julia Lynch*, not as a citizen of New York, not under any law of that State, but under a national law, a common law of the United States; but we apprehend that the learned counsel has not read the case with extreme care.

At the front of the Chancellor's opinion is the express statement:

"The Revised Statutes of New York, re-enacting so much of the act 11 and 12 William III, chapter 6, provides that no person capable of inheriting under our statute regulating descents, *shall be precluded from such inheritance by reason of the alienism of the ancestor of such person. This applies directly to the case, if Julia Lynch were a citizen when her uncle died.*"

So that the Chancellor of New York did not fail to observe the fact that her uncle was an alien, and that she claimed by inheritance from an alien.

Nor did the Chancellor hold that the question of her right to real estate in New York by descent was governed by a common law of the United States. He said expressly that the question was governed by the law of New York, which in this respect was the common law of England, that aliens cannot inherit land; but he said that *there was no*

State law which in express terms declared who were aliens or who were citizens, either in general, or for the purpose of inheriting land. "No one," he said, "can dispute the power of this, or any other State in the Union, to regulate the subject of inheritance; but where they [the State legislatures] have omitted to legislate, and the common-law disability is left to operate against aliens, the right to inherit, when disputed on this ground, must be determined on some general principle or rule of law, *which ascertains who are aliens and who are citizens.*"

Miss Lynch could not be an "alien," in the sense of the State law, if she was a natural-born citizen of the United States, and that question depended on the law of the United States under the Constitution.

(*c.*) As we have seen, Mr. Binney was of the same opinion, and in the article published by him in February, 1854, in the *American Law Register*, already referred to, expressed his dissent from the intimation of Chancellor Kent, and held that the children of American citizens born abroad were, by the principle of the common law of allegiance, operative under the National Constitution, *aliens of the United States.* In the opinion of Mr. Binney, the statute of twenty-fifth Edward III was not declaratory of the common law, but was an enabling act, and nothing but a statute for the naturalization of such children could possibly save them from alienage under the Constitution and Government of the United States. ("The Alienigenæ of the United States," 2 Am. Law Register, 194.)

(*d.*) The view expressed by Mr. Binney was adopted by Congress in the passage of the act of February 10, 1855 (10 Stats., 604), entitled "*An act to secure the right of citizenship to children of citizens of the United States born out of the limits thereof,*" which provides that "persons heretofore born, or hereafter to be born, *out of the limits* and *jurisdiction of the United States*, whose fathers were or shall be *at the time of*

their birth citizens of the United States, shall be deemed and considered and are hereby declared to be citizens of the United States: *Provided, however*, That the rights of citizenship shall not descend to persons whose fathers never resided in the United States."

This act discloses the fact that Congress understood that the common-law principle of allegiance, by which birth on the soil of the country constituted the test of original citizenship, was the law of the United States, and that all persons, of whatever parentage, born "*out of the limits and jurisdiction of the United States*" were aliens in respect to the United States unless made citizens by an act of naturalization.

(*e.*) In fact, the language and requirements of the entire body of the legislation of Congress under the power to provide a uniform rule of naturalization, having reference, as they do, only to persons *born abroad* and having no reference to any one *born here*, constitute a declaration of opinion by the legislative branch of the Government that the common-law principle of allegiance and alienage is part and parcel of the public municipal law of the United States.

(*f.*) Mr. Justice Curtis, in *Dred Scott vs. Sandford*, entertained no doubt that the Constitution recognized as a fundamental rule of natural-born citizenship of the United States what he called that "great principle of public law, that *allegiance and citizenship spring from the place of birth;*" that "*birth on the soil of a country both creates the duties and confers the rights of citizenship;*" that the term naturalization was interpretable only in reference to its meaning as fixed in the common law; that persons born within the several States were, according to the great doctrine of the common law, by virtue of the fact of their having been so born, citizens of the United States, and that there was "a native-born citizenship of the United States distinct from a native-born

citizenship of the several States." (19 How., 581, 586, 578, 577, 584.)

(*g*.) In 1862, as we have seen, the Attorney General declared, in his memorable opinion to the Secretary of the Treasury, that by the rule of our national law birth on the soil of the country and allegiance to the United States went together, and that all free persons, of whatever parentage, born within the limits and jurisdiction of the United States, were born in the allegiance and were natural-born citizens of the United States.

Mr. Bates regarded the judgment in the *Dred Scott Case* as limited in law, as it is, in fact, limited on the face of the record, to the plea in abatement, and he said:

"Taking the plea, then, strictly as it is written, the persons who are excluded by this judgment from being citizens of Missouri must be *negroes*, not mulattoes nor mestizos nor quadroons. They must be of *African* descent, not *Asiatic*, even though they come of the blackest Malays in southeastern Asia. They must have had *ancestors* (yet that may be doubtful if born in slavery, of putative parents, who were slaves, and, being slaves, incapable of contracting matrimony; and therefore every child must needs be a bastard, and so by the common law *nullius filius*, and incapable of ancestors). His ancestors, if he had any, must have been of *pure* African blood, not mixed with the tawny Moor of Morocco or the dusky Arab of the desert, both of whom had their origin in Asia. They must have been *brought* to this country, not come voluntarily; and *sold*, not kept by the importer for his own use, nor given to his friends."

The Attorney General deemed whatever was said respecting the legal merits of the case and any supposed legal disability resulting from the fact of color, "though entitled to all the respect which is due to the learned and upright sources from which the opinions come," as of no authority as a judicial decision.

Nor was the particular view expressed by Mr. Justice Curtis in the *Dred Scott Case*, that the States could so legislate as to determine what persons born within their respective limits should acquire by birth citizenship of the United States, accepted by the Attorney General as based upon a sound construction of the Constitution, although the view of Mr. Justice Curtis is not expressly referred to in his opinion.

The opinion of Attorney General Bates is printed in the Appendix to the Report of the Royal Commission of 1868 as an authoritative exposition of the law of the United States as to original Citizenship under the Constitution. (Report of Naturalization Commission, Appendix, p. 87. See also public document entitled, "Opinions of the Principal Officers of the Executive Department and other Papers relating to Expatriation, Naturalization, and Change of Allegiance," 1873, for the Report of the British Commission of 1868, p. 64.)

IV. It follows from all this that the citizenship clause of the Amendment, construed, as it must be, with reference to the law of natural-born citizenship under the original Constitution, as determined by judicial decisions and juridical opinions before the article was framed and known by its framers, is merely declaratory of the fundamental principle of that law, coeval with the Union, that allegiance and citizenship spring from and are dictated by the place of birth and not descent, and excepts no native-born person from the right of citizenship on account of the alienage or political condition of his parents.

The foundation of the law of national citizenship under the Constitution was discussed by Mr. Justice Swayne in the well-known opinion delivered by him, in 1866, in the case of *United States vs. Rhodes*, in the Circuit Court of the United States for the District of Kentucky (1 Abb. U. S.

Rep., 38). The case arose under the Civil Rights Act of April 9, 1866, and it was held by the Circuit Court that the term "citizen," as understood in our law, is precisely analogous to the term "subject" in the common law; and as in England all persons born in the allegiance of the King are natural-born subjects, so "all persons born in the allegiance of the United States are natural-born citizens."

Mr. Justice Swayne said:

"Birth and allegiance go together. Such is the rule of the common law, and it is the common law of this country as well as of England. There are two exceptions, and only two, to the universality of its application. The children of ambassadors are, in theory, born in the allegiance of the powers the ambassadors represent, and slaves, in legal contemplation, are property and not persons (2 Kent Com., 3d ed., 1; Calvin's Case, 7 Coke, 1; 1 Black. Com., 366; Lynch *vs.* Clark, 1 Sandf. Ch. R., 139). The common law has made no distinction on account of race or color. None is now made in England, nor in any other Christian country of Europe. * * * We cannot deny the assent of our judgment to the soundness of the proposition, that the emancipation of a native-born slave by removing the disability of slavery made him a citizen."

Fifth.

There is no warrant in any of the terms of the Fourteenth Amendment for imputing to it an intention to base the rule in respect to the citizenship of persons "born" in this country upon personal considerations—upon the nationality of the parents or fathers of such native-born persons—and to exclude or except from natural-born citizenship the children "born" in the United States of foreign parents who are not exempted by positive international law from the territorial jurisdiction of the United States.

I. Citizenship or Nationality is the status of a person as citizen or subject in relation to a particular State, and it is either *natural* or *acquired*—natural when it results from *birth*, *acquired* when a person is *made* a citizen or subject by a State to which he did not originally belong—and no person *born* in this country, and within the allegiance of the United States, can be *made* a citizen by naturalization under the Constitution. (Mr. Binney, "The Alienigenæ of the United States," 2 Am. Law Register, 194.)

It is understood by all publicists, as we have said, that there are two wide principles which form the basis of the municipal laws of States in respect to natural citizenship, and by which States are governed in claiming or rejecting persons as their members by birth. One of these bases its conclusion upon the *place of birth*, the fact of birth within the *territorial jurisdiction*, irrespective of parentage. The other proceeds upon *personal considerations*, upon the nationality of the parents, irrespective of the place of birth (Walker, Science of Int. Law, 220.)

II. The Fourteenth Amendment declares the rule of natural, original, or "natural-born" citizenship of the

United States, and it excludes, by the necessary import of its terms, no native-born "persons" who, at the time of their birth, are not *exempted* by positive international law from the operation of the territorial sovereignty of the United States.

There are no words in the Amendment countenancing the idea that it was intended to declare in respect to native-born persons that their character as natural-born citizens or aliens of the United States, should depend upon *personal considerations* founded on the nationality of their fathers, and to reject native-born persons as citizens whose fathers are aliens while accepting as citizens persons of the same class whose fathers are citizens.

Manifestly, if it had been intended by the Amendment to *recast* our law of native nationality by introducing the principle of *descent*, however indirectly, such an intention would have been avowed or expressed in some manner in the Article.

It must be assumed that its framers knew the limitation upon the power of Congress in respect to the naturalization of persons of *domestic* birth, and that if there had been a purpose to except such persons, not exempted from local jurisdiction, from natural-born citizenship, some provision would have been made for removing their disabilities, resulting not from foreign birth, but from *birth on the soil of the United States.*

III. It will be seen also that every *word* of the Article absolutely excludes the legal possibility of any conclusion that there was a purpose to change or modify in any respect the original principle of our law by which our nationality was always acquirable by the mere fact of being born in the territory and under the protection of the United States, whether the father of the native, if a foreigner, was domiciled or settled or merely temporarily sojourning in the country.

The provision operates upon all "persons" as *persons*, and not as the children of citizens or with any reference to their fathers or the condition of their fathers, and declares that they—that is to say, "all persons"—if "*born*" in the United States and subject to the jurisdiction thereof, are "citizens of the United States and of the State wherein they reside."

The *sole* test declared is the fact of their having been born in the territory and subject to the jurisdiction of the United States, and *nothing else* can be *added* to it.

No other persons are citizens, under the Amendment, except persons *naturalized* in and subject to the jurisdiction of the United States, and they are persons of *foreign* birth who *acquired* citizenship under the Constitution and laws of the United States.

IV. The term "jurisdiction" of the United States is manifestly used with reference to the sovereign power of the United States within the limits of its territory, by which it possesses, as an independent State, the right to control by its laws all persons, property, acts, and events therein, including the right to impress the character of citizens upon "all persons," of whatever parentage, born therein, who are not exempted by positive international law from the operation of the territorial sovereignty of the Government.

The provision is that all persons born *in the United States*, meaning, of course, the *territory* of the United States, and "subject to the jurisdiction thereof," are natural-born citizens. The jurisdiction referred to is, therefore, the jurisdiction of the United States as a sovereign State in relation to its *territory*, and persons within it, the extent of which and the exceptions to which are defined under a distinct branch or head of public international law.

The words "subject to the jurisdiction thereof," in fact, create no *real* exceptions to the rule of national citizenship. They were intended to recognize the settled principles of the law of nations in respect to "sovereignty in relation to the

territory of the State," by which certain persons are exempted from that sovereignty, and "are said to be in law *outside of the State in which they are*," and not to include them in the operation of the Amendment.

Mr. Hall has vividly described the international-law "doctrine of exterritoriality" recognized and applied by the words "subject to the jurisdiction thereof" in the Amendment.

"The relation," he says, "created by these immunities is usually indicated by the metaphorical term exterritoriality, the persons and things in enjoyment of them being regarded *as detached portions of the State to which they belong, moving about on the surface of foreign territory and remaining separate from it.* The term is picturesque. It brings vividly before the mind one aspect, at least, of the relation in which an exempted person or thing stands to a foreign State; but it may be doubted whether its picturesqueness has not enabled it to seize too strongly upon the imagination. Exterritoriality has been transformed from a metaphor into a legal fact. Persons and things which are more or less exempted from local jurisdiction are said to be in law *outside of the State in which they are.*" (Hall, International Law, ch. IV, § 48.)

The children born here of foreign parents, who are regarded by the metaphor of the law of nations as attached to the territory of a foreign State, "moving about on the surface" of the territory of the United States and "remaining separate from it," are not born "subject to the jurisdiction" of the United States, but are born "subject to the jurisdiction" of such floating foreign State, and are thus excepted by the Amendment from its operation or, more strictly, are not included in the Article.

The so-called exceptions contemplated and provided for by the Amendment to the declared rule of nationality serve only to illustrate and confirm the rule that citizenship is established by the fact of birth in the country. The exceptions are persons born of alien parents, who, by the

positive law of nations, are regarded as having been born *outside* of the territory of the United States, and *beyond* its territorial jurisdiction, and who are not, therefore, persons born *in* the United States, and "subject to the jurisdiction thereof," within the meaning of the Amendment.

V. The children born here of alien parents are *not* born "subject to the jurisdiction" of their *parents'* country, although that country may regard such persons as its lawful citizens or subjects, and would treat them as such, if they themselves should return to and abide in their parents' country, and claim to be and act as subjects or citizens thereof.

The Government of the *parents' country* had and could have no "*jurisdiction*" over such native-born persons *in the territory of the United States.* Its laws could not operate beyond its own territory, and could not affect persons born in the United States, or determine the *status* or condition of such persons, as citizens or aliens, in the United States. The *status* of such native-born persons, as citizens or aliens, in the territory of the United States, could be determined only by the law of the United States, which is the *supreme and exclusive law* within and for that territory.

Sixth.

The United States, by its People, had the undoubted jurisdiction, power, and right to impress upon the children born of the subjects or citizens of another State in the territories of the United States, the character and quality of citizens of the United States, whether the foreign parents of such children were settled or merely temporarily sojourning in the country at the time of the birth of such children in the United States.

I. This follows from the doctrine of the independence of every State, from which flow the rights of sovereignty, which include the right to determine the condition of persons, as citizens or aliens, within the territory of the State; so that primarily it is a question for the municipal law of a nation to determine whether a given individual is to be considered its citizen or subject, and in respect to all persons as to whose nationality a difference of legal theory can exist, international law has made no choice, and it is left open to States to act as they like (Hall, International Law, chap. V, § 66). As to persons born of the subjects of one State within the territory of another, their adoption by the State within whose territory they are born as its citizens or subjects, is consistent with the due recognition of the independence of the State to which their parents may belong, and it is left open, therefore, to every State to act as it likes in respect to such native-born persons. It is well understood, as stated by Mr. Hall, that until the establishment of the Code Napoleon, in 1808, no nation regarded the children of foreigners born upon its soil as aliens.

No independent State is obliged to adopt as its policy the rule of determining the nationality of persons born within its territory, by descent, or to allow the municipal law of a foreign State, in respect to the nationality of the children of its subjects born abroad, to take the place of its own customary law, within its own jurisdiction, by which such

children, born on its soil, are regarded as its natural-born citizens.

In the view of the customary law of England and the United States, the child's first protector is the Government under which it was born, and it owes an original, natural, and legal obligation to the country of its birth, and not to the country of its father's birth, although by its laws the latter country may deem the child to be one of its own citizens or subjects.

II. Every nation, therefore, has the undoubted right, as incidental to its right of jurisdiction or right of empire, to establish within and for its own territory its own law of natural or original allegiance and alienage, and all persons found within the limits of that territory are legitimately bound by that law, and by what it ordains, in respect to the natural-born citizenship of persons who may be born within the territory of the nation.

No foreign law on that subject can have any operation within the limits of the nation of birth without its consent, and no law other than that of the country of birth, therefore, can determine the political condition, as natural-born citizens or aliens, of native persons within the limits of its territory.

And the State has the undoubted right to apply its law of nationality to the children born of persons temporarily in its territory, as well as to the children of those who may be domiciled or settled there, and in neither case can the law of the parents' country in respect to the citizenship of such children have effect within the country of their birth without its consent.

As has been said, the power of a nation to so legislate as to impress its national character upon all persons, of whatever parentage, *found to have been born within its territory*, flows directly and necessarily from its right of empire, its right of exclusive and absolute civil and criminal legislation within its territorial limits, or, in other words, its right of sovereignty within those limits.

Seventh.

According to the settled principles of the law of nations, agreeably to which the terms, "subject to the jurisdiction" of the United States, in the Fourteenth Amendment, must be interpreted, a child born in the territory of the United States of alien parents, not exempted by the law of nations from the territorial sovereignty of the United States, and whether domiciled or settled, or merely temporarily sojourning therein, is born therein "subject to the jurisdiction" of the United States, and of no other power. The "jurisdiction" of the United States is the sovereignty of the United States within and over its own domains, or its territorial sovereignty, as contemplated by the law of nations.

I. As the Amendment deals with a matter appertaining to law, it is to juridical science that we are to look for the interpretation of its terms; and since it deals with the "jurisdiction" of the United States as a Sovereign State in relation to persons born in the territory thereof, we are to inquire the meaning and application of that term as it is used in international law, and the limits of the "jurisdiction" of a Sovereign State according to the principles of that law.

Professor Mountague Bernard concisely defines a Sovereign State to be "a community or number of persons permanently organized under a Sovereign Government of their own, and by a Sovereign Government we mean a Government, however constituted, which exercises the power of making and enforcing law within a community and is not itself subject to any superior Government. These two factors—the one positive, the other negative—compose the notion of sovereignty and are essential to it." (Bernard, Neutrality of Great Britain during the American Civil War.)

Mr. Maine, in his Lectures on International Law, dwells

upon the fact that sovereignty was not always "*territorial*," not always associated with a definite portion of the earth's soil, the fundamental conception being that the territory belonged to the tribe, and the sovereign is sovereign over the tribe. "At this day sovereignty is always associated with a *definite portion of the earth's surface.*" (Maine, Lectures on International Law, lect. III.)

In his principal works, Mr. Maine shows that during a large part of what is termed modern history, no such conception was entertained as that of "territorial sovereignty." (Ancient Law, p. 99; Early History of Institutions, p. 76.)

And without that conception—if sovereignty had not become *territorial*—as Mr. Maine states, "three parts of the Grotian theory would have been incapable of application."

"The fact is," says that great jurist, "that the feudalization of Europe had to be completed before it was possible that sovereignty could be associated with a definite portion of the soil."

At the present time, the normal relations of civilized States are all deducible from the simple conception of "*State sovereignty.*"

The "jurisdiction" of a Sovereign State, in its juridical sense, is defined nowhere more clearly and completely than in the great opinion delivered for this Court by Chief Justice Marshall in the leading case of *The Schooner Exchange vs. McFadden* (7 Cranch, 136).

It is there described, agreeably to the meaning of the term in the law of nations, as the full and complete power of a nation, as a sovereign, "*within its own territories.*"

"The *jurisdiction* of the nation within its own *territory* is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an *external source*, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent

in that power which could impose such restriction. All exceptions, therefore, to the *full and complete power of a nation within its own territories*, must be traced up to the consent of the nation itself. They can flow from no other legitimate source."

And the Chief Justice remarked that "the *jurisdiction* of courts is a branch of *that* which is possessed by the nation as an independent sovereign power."

"All sovereigns," he observed, "have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete *jurisdiction* within their respective territories which sovereignty confers."

This has given rise to a class of cases "in which every sovereign is understood to waive the exercise of a part of that complete, exclusive *territorial jurisdiction*, which has been stated to be the attribute of every nation."

One of these cases is the "immunity which all civilized nations allow to foreign ministers." And the Chief Justice said:

"Whatever may be the principle on which this immunity is established, whether we consider him as in the place of the sovereign he represents, or by a political fiction suppose him to be *extraterritorial*, and, therefore, in point of law, not within the *jurisdiction* of the sovereign at whose court he resides; still, the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of exterritoriality could not be erected and supported against the will of the sovereign of the territory. He is supposed to assent to it."

Writers on the public law of nations treat this subject under the title of the "Right of Jurisdiction," or "Sovereignty in Relation to the Territory of the State," "Territorial Sovereignty," or "Territorial Jurisdiction." (1 Phillimore, Int. Law, ch. XVIII, XIX; Hall, Int. Law, chap. IV; Twiss, Int. Law, chap. IX; Wheaton Int. Law, part II, chap 2.)

"Every nation," says Mr. Wheaton, "possesses exclusive sovereignty and *jurisdiction* throughout the full extent of its *territory*." (Wheaton, International Law, part II, chap. II.)

Chancellor Kent says:

"No nation has any *jurisdiction* at sea, except it be over the persons of its own subjects, in its own public and private vessels, and so far as territorial jurisdiction may be considered or preserved, for the vessels of a nation are, in many respects, considered as portions of its territory, and persons on board are protected and governed by the laws of the country to which the vessel belongs. This *jurisdiction* is confined to the ship, and no one has a right to probibit the approach of another at sea or to draw around her a line of *territorial jurisdiction*, within which no other is at liberty to intrude." (1 Kent, Commentaries, 26.)

The "jurisdiction" of a State in relation to its territory was discussed with great learning, it will be remembered, by the judges of England in the celebrated case of *The Franconia, Queen vs. Keyn* (L. R., 2 Exch. Div., 63), which was followed by the "Territorial Waters Jurisdiction Act" of 41 and 42 Vict., c. 73.

"The Empire united to the domain," says Vattel, "establishes the *jurisdiction* of the Nation within its territory." (Droits des Gens, B. 11, § 84.)

Thus it is that the "jurisdiction" of a State is the Empire of the Nation within its own domain, incidental to which is its Right of Civil and Criminal Legislation in respect of all property and persons, all acts and events, within that domain. Sir Travers Twiss, in the chapter of his work, entitled "*Right of Jurisdiction*," states the doctrine thus:

"The Empire of a Nation within its own territory is of Natural Right exclusive and absolute. All exceptions, therefore, to the free exercise of the Right of Empire by a Nation

within its own territory must be derived from the consent of the Nation itself.

"The Right of Civil and Criminal Legislation in respect to all property and persons within the territory of a Nation is an incident of the Right of Empire." (Twiss, Law of Nations, "Right of Jurisdiction," ch. IX.)

The "jurisdiction" of an independent Sovereign State, therefore, is its absolute and exclusive *territorial sovereignty* over all persons found on its land and waters, and over all acts, events, conduct, and contracts, and over all possessions, real and personal, within the State territory. And this is the sense in which the term must be understood to be employed in the Amendment.

II. The exceptions introduced by the international doctrine of *exterritoriality* to the full and complete "*jurisdiction*" of a nation within its own territories are stated by Mr. Walker in his recent work to be chiefly these:

(*a.*) Foreign sovereigns traveling within the territory in their proper character, together with their personal attendants.

(*b.*) Ambassadors and other ministers of legations representing foreign sovereigns within the States to which they are accredited, together with their attendant suites.

(*c.*) Military forces of a foreign State passing in their proper character through the territory, and naval forces of foreign States—*i. e.*, men of war, with their boats and crews—lying within territorial waters. (Walker, Science of International Law, p. 221.)

Mr. Webster, in his celebrated correspondence with Lord Ashburton, in 1842, on the *Creole Case*, maintained also that "the *jurisdiction* and laws of a nation accompany her ships,

not only over the high seas, but into ports and harbors, for the general purpose of governing and regulating the rights, duties, and obligations of those on board thereof, and to the extent of the exercise of this jurisdiction they are considered as parts of the *territory* of the nation itself." ("*Maritime Rights*," Works of Webster, vol. 6.)

In the cases of all exceptions, real or alleged, however, to the *exclusiveness* of the territorial jurisdiction, the exemption is at once civil and criminal, and the sovereign abnegates *in toto* his right of empire or sovereignty so long as his toleration is compatible with self-protection; but he does not permit the exercise in his confines by any foreign ruler of the appropriate functions of sovereignty.

"The inviolability of the person of an ambassador entails, as a necessary incident, his entire exemption from the territorial jurisdiction. According to this fiction (extraterritoriality) the public minister, although *de facto* resident in a foreign country, is regarded as *de jure* resident within the territory of the nation which he represents, and he continues to be subject to the *laws* of his own country in all matters which concern his personal *status* and property." (Twiss, Law of Nations, § 200.)

Dr. Woolsey says that an ambassador is conceived of as bringing his native laws with him out of his native territory. (International Law, § 64.)

It is well settled, for example, that it is only by the immunity of an ambassador, under the positive law of nations, from the territorial "jurisdiction" of the State to which he is accredited, that children born to him there do not become citizens of the State, if all persons born within its territory are declared by its laws to be so. (Hall, Int. Law, § 50.)

As stated by Mr. Hall, the ambassador is conceived by the law of nations as being "*outside the jurisdiction*" of the

State to which he is accredited, and "thus children born to him within that State are not its subjects, notwithstanding that all persons born of foreigners within its territories may be declared by its laws to be so."

The children born within a State to all aliens who are not exempted by the public law from its territorial sovereignty, whether the residence of their parents within the territory is PERMANENT OR TEMPORARY, are born under and subject to the operation of the territorial sovereignty of the State, and become its citizens or subjects if declared to be so by its laws. They are born "*subject to the jurisdiction*" of the State of their nativity.

III. Agreeably to these elementary principles of the law of nations, by which the Amendment is to be interpreted, all persons born in the United States under and subject to the territorial sovereignty thereof, are born subject to the "jurisdiction" of the United States within the meaning of the Article. It follows, therefore, that all children born in the United States of alien parents, who are not exempted by the positive law of nations from the territorial sovereignty of the United States, are born "subject to the jurisdiction thereof," within the meaning of the Amendment, and are declared to be natural-born citizens of the United States—that is to say, persons who owe by birth permanent allegiance to the United States. Such persons are born in the territory of the United States, and within the allegiance of the United States, and are, therefore, natural-born citizens of the United States.

Eighth.

It follows from the preceding argument that all persons born in the United States of alien parents, temporarily sojourning in the country, without immunity from the territorial sovereignty of the United States, under the doctrine of exterritoriality, are "subject to the jurisdiction" of the United States, agreeably to the intended meaning of the Amendment, and are included in and embraced by the Amendment, and are not excluded or excepted from its operation.

I. As has been shown, there can be no just doubt that the Amendment was intended to be based upon the doctrine derived from the common law, that the character of a natural-born citizen is incidental to birth only, whatever was the situation or predicament of the parents, as settled or merely temporarily sojourning in the country; the being born within the territory of the State constituting a *natural-born citizen*, the being born out the State territory constituting an *alien*. (Duroure *vs.* Jones, 4 Term R., 308.)

The citizenship clause of the Article, agreeably to the principles of law applicable to its interpretation, must be construed with reference to this doctrine of the common law, which, as understood by the framers of the Amendment, originally governed the matter of citizenship and alienage in this country, and with reference to which it was definitely intended that the terms of the Article should be interpreted.

There was no intention to change the established rule under the common law in respect to the effect of birth only within the dominions of the State as determining the original political status of the native-born person.

That rule is illustrated by the case of Mrs. Preto and her daughter, which was the subject of the opinion given by

Mr. Bates to Mr. Seward, in 1862, already referred to (10 Ops. Att'ys Gen'l, 321). The daughter was born in Washington of a Spanish subject, who, while only temporarily residing here, married an American lady. The daughter was a child only three years old when the family went to Spain. It was held that Miss Preto became a citizen of the United States by birth, although by the law of Spain she was undoubtedly a Spanish subject, and that the removal to Spain and residence of the family in that country constituted no evidence of an attempt on her part to cast off her native allegiance to the United States, and adopt Spanish allegiance. She always claimed, as stated, to be an American citizen. The Attorney General said that he did not question the right of voluntary expatriation and the choice of a new allegiance, which, of course, had nothing to do with the question of the original citizenship by birth of the daughter of Mr. Preto, which was the fundamental question in the case. It was not doubted that the citizen by birth or naturalization could renounce or abjure the citizenship and allegiance thus acquired, and lose or forfeit the right to receive protection from the Government; but that was another and different question from the question of the original citizenship of Miss Preto.

II. A child born in the United States of an alien father, temporarily sojourning in the United States, without immunity from the territorial sovereignty of the United States, under the international doctrine of exterritoriality, is subject, at the time of his birth, to the "jurisdiction" of the United States, agreeably to the intended meaning of that term, and is within the provision of the Amendment, and is not excluded or excepted from its operation.

Specifically, it was intended by the framers of the Amendment *not* to change by that language the general principle in respect to birth, under whatever circumstances, in the territory of the United States, as the test of original citizen-

ship of the United States. The birth may be *casual*, or it may be *otherwise*, but its primary and necessary effect is the same under the Constitution.

The "jurisdiction" of the United States referred to in the Article, as we have said, is the jurisdiction which a State possesses, in the contemplation of the public law of nations, within certain limits, by virtue of its territorial *sovereignty*, and which is exercisable over *all* persons, without reference to their condition or parentage or the nationality of their parents, found anywhere upon land and waters within its territory.

The new-born infant of a transient alien is, at and from the moment of its birth, as completely "subject to the jurisdiction" of the United States, in its territory, in the sense of the public law and the Amendment, as any other human being born in the dominions of the United States, and is impressed at once, by the Amendment, with the national character. It is not excepted from the jurisdiction of the United States, as exercised by any Department of its Government, executive, legislative, or judicial, by reason of any of its conditions growing out of its parentage, or the relations of its parents to the country or the Government. The infant is, in fact, a *subject* of the United States at the instant of birth, and takes its nationality in the United States from and under the Amendment as naturally as it breathes the air of the country.

Sir Travers Twiss says:

"Huberus (De Conflictu Legum) has propounded three maxims which Mr. Justice Story, Mr. Wheaton, and M. Faelix equally approve as being conformable to the practice of nations. The first is that the laws of every empire have force only within the limits of its own government and bind all who are *subjects* thereof, but not beyond those limits. The second is that *all* persons who are *found within the limits of a government, whether their residence is permanent or temporary*, are to be deemed SUBJECTS THEREOF. The third is that the rulers of every empire from comity admit that

the laws of every country in force within its own territorial jurisdiction ought to have the same effect everywhere, so far as they do not prejudice the power or rights of other governments or of their citizens." (Twiss, International Law, §153.)

Story, Conflict of Laws, ch. 2, §§ 17–20, 29–31.
Wheaton, International Law, pt. II, ch. 11, p. 115.

Mr. Justice Story, in his *Conflict of Laws*, says:

"The first and most general maxim or proposition is that every nation possesses an exclusive sovereignty and *jurisdiction* within its own territory. The direct consequence of this rule is that the laws of every State affect and bind directly all property within its territory and *all persons* who are residents within it, whether natural-born subjects or aliens, and all contracts made and acts done within it.

"Another maxim or proposition is that no State can by its laws directly affect or bind property out of its territory or bind *persons not resident therein, whether they are natural-born subjects or others.*"

He then approves the maxims of *Huberus*, the second of which is that all persons who are *found* within the limits of a government, whether their residence is permanent or temporary, are to be deemed *subjects* thereof. The maxim of Huberus is also adopted by Mr. Wheaton as expressing the rule of international law.

There can be no doubt that the framers of the Amendment were familiar with these universally recognized principles of public law, and selected the language of the Article with direct reference to them, and intended that the language of the Article should be interpreted by them.

III. Unquestionably, the child born here of a transient alien becomes from the moment it is born subject to the authority and protection of the laws of the United States, in the exercise of its territorial sovereignty, and subject also

to the right of national protection by the United States, as a citizen of the United States, against an aggression or injury by any foreign power, and such a right would undoubtedly be exercised by the United States, as a Government, in any case in which its intervention might become necessary for the enforcement of the just international rights of such a child against the government of the country of the father, as well as any other foreign government.

The situation of the *parents*, in relation to the territory of the United States, has nothing whatever to do, in fact, with the subjection of the native child, at the time of its birth, to the "*jurisdiction*" of the United States, in the contemplated sense of the Amendment.

The rights of sovereignty give *jurisdiction* over ALL persons born within the territories of a State, without any reference or regard to the character or circumstances of the *residence* of their parents, as permanent or temporary, within the limits of the State, and this is equally true whether the parents are *citizens* or *aliens* of the State.

IV. It follows from these principles that the native-born child of an alien, whether the residence of the foreign parents in the United States, at the time of his birth, was transient or domiciliary, was not subject, at the time of his birth, in the United States, to the "*jurisdiction*" of the parents' country or any other foreign country, although the child may be deemed by the laws of the parents' country to be a natural-born subject or citizen of that country, and would be treated as such by the parents' country within its territorial limits.

Mr. Justice Story, speaking of the binding force of the laws of a country upon its citizens, states:

"Whatever may be the intrinsic or obligatory force of such laws upon such persons if they should *return* to their native country, *they can have none in other nations where they reside.* Such laws may give rise to personal relations be-

tween the sovereign and subject, *to be enforced in its own domains*, but they do not rightfully extend to other nations, '*statuta suo clauduntur territorio nec ultra territorium disponunt*,' nor, indeed, is there, strictly speaking, any difference in this respect, whether such laws concern the persons or concern the property of native subjects. * * * When, therefore, we speak of the right of a State to bind its own native subjects everywhere, we speak only of its own claim and exercise of sovereignty over them *when they return within its own territorial jurisdiction*, and not its rights to compel or require obedience to such laws on the part of *other* nations *within their own territorial sovereignty*. On the contrary, every nation has an *exclusive right* to regulate persons and things within its own territory according to its own *sovereign will and public policy*." (Conflict of Laws, § 22.)

Sir Travers Twiss shows that National Sovereignty is properly Territorial, and that it would be "inconsistent with the absolute and exclusive character of Territorial Empire if the laws of a Nation could bind persons within the territory of another Nation, and so control the operation of the laws of the latter Nation within its own territory" (Int. Law, § 151). And he approves the observation of Rodenburg that "*no sovereign power can of right set law beyond the limits of its territory*." (Rodenburg, De Statutis, tit. 1, c. 3, § 1.)

The native-born child of an alien, though he may be, in the view of the municipal laws of his parents' country, a natural-born subject of that country, can be subjected to the operation of those laws only *within the territorial jurisdiction of that country*. Such native-born person, at the time of his birth, is subject only to the jurisdiction of the United States.

These principles were recognized by Mr. Fish, as Secretary of State, in the able opinion given by him to President Grant on the general subject of nationality and allegiance in 1873.

"No sovereignty," said Mr. Fish, "can extend its *jurisdiction beyond its own territorial limits*, so as to relieve those *born* under and subject to *another jurisdiction* from their obligations or duties thereto, nor can the municipal laws of one State interfere with the duties or obligations which its citizens incur while voluntarily resident in such foreign State, and without the jurisdiction of their own country. * * * *The child born of alien parents in the United States is held to be a citizen thereof, and to be subject to duties with regard to that country which do not attach to the father.* The same principle on which such children are held by us to be citizens of the United States, and to be subject to duties to this country, applies to the children of American fathers born without the jurisdiction of the United States, and *entitles the country within whose jurisdiction they are born to claim them as citizens and to subject them to duties to it.* Such children are born to a double character. The citizenship of the father is that of the child so far as the laws of the country of which the father is a citizen are concerned, and *within the jurisdiction of that country;* but the child, from the circumstances of his birth, *may acquire rights and owes another fealty besides that which attaches to the father.*" (Opinions of the Principal Officers of the Executive Departments, Expatriation, &c., 1873, p. 17.)

V. The fact is that the authority possessed by a State over its citizens or subjects resulting from the *personal relation* based on allegiance existing between the State and such persons, is no "*jurisdiction*" at all, to which such persons are "*subject*," outside of the State territory and while they remain within the dominions of another power.

Such authority cannot be enforced by the State against persons claimed to be its citizens except by the sanctions of its municipal laws, and consequently in places within its own territorial sovereignty.

Within the territorial sovereignty and jurisdiction of a

foreign State, no authority on the part of the State over its citizens, as such, to which such persons are "subject," or can be subjected, has any existence. (Hall, International Law, § 73; Case of Carl Vogt, Extradition, 14 Opinions Att'ys Gen'l, 281, 283, 285.)

VI. It is, of course, unnecessary in this connection to consider whether the American citizenship of a person born in the United States of an alien father may be effectually lost, and, if so, by what acts on the part of the citizen it may be so lost. Whether he may renounce or abjure his American citizenship and the rights and duties thereof, and completely divest himself of them, and by what means that may be accomplished, are obviously inquiries not involved in the consideration of the present question.

The right of expatriation is not denied by the political department of the Government of the United States, but it was said by Mr. Fish, as Secretary of State, that "in the absence of legislative declaration of what constitutes 'expatriation' and of the mode whereby it is to be effected, the experience of the Government has made manifest that while expatriation is declared to be a right which may be converted into a fact, it is, like other facts, to be established in each individual case by evidence peculiar to itself, and each case to be decided on its own merits." (*Ibid.*, p. 14.)

By the statute law of the United States persons born "out of the limits and jurisdiction of the United States," whose fathers were, at the time of their birth, citizens of the United States, are declared to be citizens, with the proviso that the "right of citizenship shall not descend to persons whose fathers never resided in the United States;" but it was never supposed that such persons, at the time of their birth, were "subject to the jurisdiction" of the United States, and were not "subject to the jurisdiction" of the foreign country of their birth and residence, or were exempt from the obligations or duties incident to their status as natural-born sub-

jects or citizens of such foreign country, if declared to be so by its laws.

As said by Mr. Fish, in the opinion above cited, every independent State may "endow with the rights and privileges of its citizenship persons residing in other countries, so as to entitle them to all rights of property and of succession within its limits, and also with political privileges and civil rights to be enjoyed or exercised within the territory and jurisdiction of the State thus conferring its citizenship; but no sovereignty can extend its *jurisdiction* beyond its own territorial limits, so as to relieve those born under and subject to another jurisdiction from their obligations or duties thereto." (Opinions, Expatriation, &c., *supra*, p. 17.)

Ninth.

It is manifest, therefore, that the question of the natural-born citizenship, or alienage, of any persons born in the United States of alien fathers, cannot be made to depend, under the Fourteenth Amendment, upon the "domicile" of their parents at the time of their birth in the United States.

I. The "*domicile*" of the parents of a person born in the United States, whether the parents are aliens or citizens, has nothing whatever to do with the "*jurisdiction*" of the United States over such native-born person, or with his being "*subject to the jurisdiction*" of the United States, and he is completely and in a full sense subject to the jurisdiction of the United States, at the time of his birth, whether his parents, being *citizens or aliens*, are at that time domiciled in this or in a foreign country.

If the native-born child of an alien, domiciled in his own country, is not a natural-born citizen of the United States, the native-born child of a *citizen* who is domiciled, at the time of the birth of such child, in a foreign land, cannot be a natural-born citizen of the United States.

The terms of the Amendment in respect to birth and the being "subject to the jurisdiction" of the United States, in fact, refer and relate to the *native-born person* himself, and not to his parents.

The Article gives effect to *his* birth, "subject to the jurisdiction" of the United States, in investing him with natural-born citizenship of the United States, and the place of the "domicile" of the parents cannot determine the question as to whether the native-born person (whether the child of an alien or citizen) is, at the time of birth, "subject to the jurisdiction" of the United States.

It cannot be doubted that a person whose father and

mother are utterly unknown, a mere *foundling*, discovered to have been "*born*" upon the soil of the country, is a citizen under the Amendment. He is born "subject to the jurisdiction" of the United States. Nor can it be doubted that illegitimate children of foreign mothers, whose fathers are unknown, born here, are citizens.

The Constitution deals directly and conclusively, not with the parents of native-born persons, but *with the native persons themselves*, as at and from the moment of birth within the allegiance, or "subject to the jurisdiction," of the Government. That is the criterion of natural-born citizenship.

II. The "domicile" of origin of a person is identical with the domicile of his father at the time of his birth, but it has never been doubted that the law of the country of his nativity may constitute him a *citizen*, notwithstanding the fact that the domicile of his father, and, therefore, his own domicile, at the time of his birth, is in a foreign country. It was never supposed, therefore, that the "jurisdiction" of a State over a native-born person depended upon or was affected by the domicile of his parents or his own domicile at the time of his birth.

The domicile of origin of a person cannot be divested during his minority, except by the act of his father, and thus during the whole period of his minority he may be a citizen of the country of his birth, while *his parents and himself are domiciled in another land.*

The native-born child of a *citizen*, resident and permanently settled abroad, is not more completely "subject to the jurisdiction," in its full sense, of the country of his birth than the child born in the same country of a *foreign father*, whose home is in his own land.

III. The fact is that the Fourteenth Amendment contains no warrant for importing into the law of American citizenship the doctrine of "*domicile*," which pertains to that branch

of jurisprudence which deals with the "extraterritorial effect of law" or the "extraterritorial recognition of rights," commonly, though inaccurately, described as "private international law." (Holland, Jurisprudence, 369; Dicey, Conflict of Laws, 3.)

Jurists agree that for convenience in determining a man's personal status or capacity, or in administering his effects, or in matters of testamentary disposition, *domicile* is to be looked to as ascertaining by what law his rights and liabilities should be ascertained; but they also agree that the question of a man's *nationality* or *citizenship*—that is, his status as subject or citizen in relation to a particular sovereign or State—is distinct from that of his domicile, and that his domicile is not the criterion or test of his nationality or citizenship. (Savigny, Private International Law, 81; Westlake, Private International Law, p. 19; 4 Phillimore, International Law, 21; Lords Westbury and Hatherley, in Udney *vs.* Udney, L. R. Scotch Appeals, 1866–'69, pp. 45, 47.)

Mr. Dicey, in his *Conflict of Laws*, has well shown that while the principles of "private *international* law" are laws, in the strictest sense of the term, yet they are not *international* at all, for they are actual laws of a particular country, which determine the *private rights* of one individual against another, and they may or may not belong to the same nation, and that the term, therefore, is essentially inaccurate.

This inaccuracy has no doubt contributed to the misuse which has sometimes been made of the principle of domicile in connection with citizenship under the Constitution.

The erroneous notion that it is a doctrine of international law, or the law of nations, that "the child follows the nationality of the parents," has probably its origin, to some extent, in the inaccuracy of the term, private international law.

Tenth.

There is no foundation for any such extraordinary theory as that by "international law" the children born abroad of American citizens are regarded as citizens of the United States, and the children born here of foreigners are deemed to be citizens or subjects of their parents' country, whether the parents are in transient residence or settled in the country of their children's nativity.

I. By "international law," used in any proper sense, is meant those rules of conduct which States regard as binding on them in their relations with one another, and as enforceable by appropriate means in case of infringement; but, as has been said before, the question whether the children born abroad of the citizens or subjects of a State shall have the nationality of their parents, anywhere or for any purpose, is outside the scope of those rules, and is left by them to the exclusive determination of the municipal laws of individual States.

International law has nothing to do with the question, and does not purport to determine it for any independent State, or express its approval of any specific usages or legislation in respect to the matter.

A nation is supposed to be the only proper judge of who are its citizens or subjects.

The Act of Congress of February 10, 1855, which extends American citizenship to persons born out of the limits and jurisdiction of the United States, whose fathers were at the time of their birth citizens of the United States, but limits the privilege to one generation, unless the parents have resided in the United States, and which was preceded by the Acts of 1790, 1795, and 1802, was passed in the exercise of the power of Congress to establish an uniform rule of natu-

ralization, and it was not supposed that the legislation was founded on or declaratory of any rule of "international law" by which the children born abroad of American citizens are regarded as citizens of the United States. The circumstance of the existence of this legislation shows that it was not believed that by "international law" such persons were citizens of the United States.

The only doubt was whether, by the dormant principles of the common law, constituting the basis of the municipal law of the United States in respect to citizenship, the children born in foreign countries of native-born American fathers were naturalized as citizens of the United States, and the legislation was intended to obviate that doubt. (The Alienigenæ of the United States, 2 Am. Law Reg., 193.)

Great Britain, also, by her municipal laws extends her nationality to the sons and grandsons of British subjects born within the legiance of other countries; but no English jurist has ever asserted that this legislation proceeds upon any principle or rule of "international law" by which the children born of the subjects of one power within the territory of another are regarded as the subjects or citizens of the former.

Nor does Great Britain claim that by "international law" the children of her subjects born in foreign countries are not subject to the jurisdiction of those countries, and that they have not the full right to claim such persons as their natural-born subjects, and subject them to the obligations incident to their status as such natural-born subjects, so long, at least, as they continue to remain therein. On the contrary, it is declared by the British Government that the British nationality conferred by statute upon the children of British subjects born abroad cannot and does not avail them as against or in derogation of their antecedent obligations to the country of their birth. (Diplomatic Correspond-

ence, Naturalization Commission Report, Appendix, pp. 60, 67.)

II. There is, therefore, no principle or rule of international law by reference to which the Constitution can be so limited by construction as to exclude from natural-born citizenship any persons born of alien parents within the territorial jurisdiction of the United States.

Eleventh.

Manifestly, it was the express intention of the Amendment, by the words, "subject to the jurisdiction thereof," to except from the operation of the Article those native-born persons only who, under the law of nations, were exempted from and not subject to the operation of the territorial sovereignty and jurisdiction of the United States. It was specifically intended by those words to exclude no native-born persons by reason of the alienage of their parents, whether the latter were settled or merely temporarily sojourning in the United States at the time of the birth of their children.

I. As has been said before, the Article contains no *express exceptions* to the rule of nationality which is declared and ordained by it. It is a general declaration by the people that "*all persons*" born in and subject to the jurisdiction of the United States "*are* citizens of the United States and of the State wherein they reside."

If any persons "born" in the country are *aliens* and not citizens of the United States under the Amendment, their condition as such must result from a legal *construction* of the particular words, "subject to the jurisdiction thereof," which would impute to them an absolute *intention* to except such persons from natural-born citizenship of the United States.

II. There was no intention that those words should have the effect of a declaration of *alienage* against any persons of *domestic* birth. Under a construction of the Article, giving them that effect, a native-born alien may become a root or *stirpes* of alienage to his native-born child, who may communicate his alienage to his child, and so on successively down the line forever, and thus a *race of aliens, all born in*

the United States, may be established here, not one of whom may have ever left the country nor possessed any relation to any foreign country except that of remote origin.

These aliens of the United States, or some of them, although native-born, may be born *without any nationality*. While it is probably true that nations generally confer their citizenship upon the children of subjects born out of their dominions, yet, by the laws of many countries, their subjects *forfeit and lose* their nationality by acts done in a foreign country; thus, by the Code Napoleon, the quality of a Frenchman is *lost* as well by naturalization in a foreign country as by the unauthorized acceptance of public functions under a foreign government, and by any establishment in a foreign country *sans esprit de retour*.

Similar provisions exist in many continental countries, and are, perhaps, carried farthest in Russia, where, it is said, the quality of a Russian subject is lost by unauthorized residence abroad, by voluntary absence without the intention of return, and by *disappearance;* the last being presumed of every person liable to the capitation tax, who during ten years has not been heard of at the place of his domicile; and thus it must frequently happen that the Russian nationality is lost without acquiring any other.

So that the fathers of some of our supposed native American aliens may have actually forfeited or lost in one way or another their foreign nationality before their children were born in this country, and in that case their children would be aliens, not only of the United States, but also of the *country of their fathers*.

It will be presumed that the framers of the Article knew that the power to naturalize is applicable only to those of foreign birth, and that to make one of domestic birth a citizen is not naturalization, and that they were aware of the specific consequence, which has been pointed out, of any construction of the Article which would except from it the children born here of foreigners.

It may be said in reference to the consequence which has been indicated of such a construction of the Article as seems to be considered admissible by the Government, that there would come a time when the nationality of the original ancestor of our *native-born alien* would be extinguished and a new one would take its place by the mere fact of a succession of births in this country without naturalization; but nobody could, if he tried, point to anything in our polity or jurisprudence which would operate to make American citizens out of an original native-born alien stock by the fact of a succession of births during any length of time in the United States. The alienage of the original native-born alien would constitute an impassable barrier to the acquisition of citizenship by any of his descendants in the country.

In this connection it may be observed that in the converse case of the naturalization by the act of March 26, 1790, of the children of citizens of the United States born abroad, it was provided that the right of citizenship should not *descend to persons whose fathers had never been in the United States.*

A similar proviso is found in the Act of February 10, 1855. The proviso was intended to prevent the consequence of the establishment of a race of *foreign-born citizens* who, perhaps, had never been in the United States nor had any connection with the country except through a remote ancestor; but, while that could be done under the power of naturalization, nothing could be done under the Constitution to prevent the consequence of the establishment of a race of *native-born aliens* under a construction of the Fourteenth Amendment which would exclude native-born persons from natural-born citizenship on account of the alienage of their parents.

III. The Amendment includes and applies to *all* persons who are born *in* the territory of the United States and subject to its jurisdiction, and excepts *no* persons who are within that designation and description. The primary intention of the words, "subject to the jurisdiction thereof,"

was *inclusive* and not *exclusive* or *exceptive*, and it is by the effect only of an intention to except from the operation of the Amendment those native-born persons who are not within that designation, which may be *implied* from those words, that *any* native-born person can be deemed to be unaffected by the Article or excepted from its operation.

The words in question, therefore, must be construed as intended *not* to except from the operation of the Article *any* native-born persons who, agreeably to the settled principles of the law of nations, are, at the time of their birth, subject to the rights of sovereignty of the United States, its right of empire, as within its own dominions, and as intended to except from the effect of the Article those native-born persons *only* who, by the law of nations, are entitled to exemption from the operation of the sovereign power of the United States within and over its dominions.

The object of the words in question was to exclude the conclusion that the People in their sovereign capacity intended to impress allegiance to the United States upon persons who, though native-born, are, by the recognized principles of the law of nations, not under and subject to the right of empire of the United States, as an independent Sovereign Power, within its territorial domains, but are excepted from the right of empire of the United States.

It was not intended by the Article to disregard those acknowledged principles of the law of nations by which all sovereigns are understood to have "consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete *jurisdiction* within their respective territories which sovereignty confers," and by which "a nation would justly be considered as violating its faith, although that faith might not be expressly plighted, which should exercise its *territorial* powers in a manner not consonant to the usages and received obligations of the civilized world." (The Exchange, 7 Cranch, 137.)

In the absence of any qualifying words from the great

Amendment, it might have been supposed that its intended effect was to derogate from the international rights of persons born in the United States who are embraced by those cases of exception "in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial sovereignty and jurisdiction which is the attribute of every nation," and to set aside the immunity from the operation of the territorial jurisdiction enjoyed by such persons.

It was proper, therefore, that the Amendment should so describe and identify the native-born persons to whom it was intended to apply as not to embrace within its terms those native-born persons who are within the exemptions from the sovereign jurisdiction of the United States within the territories thereof, recognized by civilized nations.

And this was done, and intended to be done, and was all that was meant to be accomplished, by the words which affect with our allegiance and nationality all persons born in the country and subject to the jurisdiction of the United States.

IV. It is manifest, also, from every line and letter of the Amendment, that its framers intended to rest the rule of American nationality upon the great principle of the common law of allegiance and alienage, which immemorially governed, as they believed, the law of citizenship in the United States. That was the principle which Mr. Justice Curtis spoke of as the "great principle of public law, that allegiance and citizenship spring from the place of birth; that birth on the soil of a country both creates the duties and confers the rights of citizenship." By that principle the character of a natural-born citizen is incidental to birth only, and whatever was the situation or predicament of the parents, the being born within the allegiance (*i. e.*, within the dominions and under the protection) of the State, constitutes a natural-born citizen, and the being born outside the allegiance constitutes an alien. (Doe *vs.* Jones, 4 Term Reports, 308; Inglis *vs.* Sailors' Snug Harbor, 3 Pet., 155.)

Thus, by the amendment, *all* persons "born" *in* the United States and subject to the jurisdiction thereof, are declared to be natural-born "citizens"—that is to say, persons who owe permanent allegiance to the United States by birth in its territory.

It was plainly intended, therefore, to except from the operation of the Amendment those only, who, though born in our dominions, are not born, in the view of the common law, and the law of nations, within the allegiance of the United States, but are born under a *foreign* allegiance, and owe obedience and duty to the laws of a foreign government alone. Such persons are not born in the United States "subject to the jurisdiction of the United States," but are born therein subject to the "jurisdiction" of a foreign power. They are conceived by the common law as well as by the law of nations (which is, indeed, a part of the common law) as being born *outside* of the territory of the United States, and not subject to its jurisdiction, but subject to the jurisdiction of a foreign State.

In the development of the common law there came a time when allegiance was regarded as "something *geographical*, and the term itself was used in a geographical sense, persons being expressed as born within or without the allegiance when little more was meant than that they were *born* within or without the realm" (Westlake, Private Int. Law, p. 9). Mr. Westlake says:

"It is no real exception to such a geographical sense that the children of (English) ambassadors born abroad are said to have been born *within the allegiance*, for an ambassador's house is reputed *part of his sovereign's realm*, and the 25 Edw. 3 St., 2, shows that the same exception was not made in favor of the children whose parents served the King abroad in any other capacity. The children, however, of the King's enemies born within any portion of the realm of which their parents might be in hostile occupation were not reputed born within the allegiance." Calvin's case, 7 Coke, p. 18*a*.

In its geographical sense, the doctrine of allegiance was meant to be retained and embodied in the Fourteenth Amendment.

V. It was not intended by any language in the Amendment to allow the *status* of any native-born persons, as citizens or aliens in their relation to the United States, to be fixed in any wise by the laws of nationality of any foreign States of which the parents of such persons might be citizens or subjects, or to recognize those foreign laws as having operation upon native-born persons within the territory of the United States.

The Amendment, as we have said, is an expression of the great underlying principle of the customary law of England and the United States that the child's first protector is the government under which it was born, and that it owes a primary, natural, and legal obligation to that government and not to the country of his father's birth, and was not intended to allow the original status of any persons born within the domains of the United States to be assigned to them by foreign laws based upon a different principle of original nationality.

If it had been intended by the great Amendment to recast the doctrine of American nationality by recognizing descent as the accepted rule of American citizenship, that rule would have been expressly declared by the Article.

Twelfth.

There is not and never was any rule of international law by which the nationality of children born of the subjects of one power within the territory of another is dictated by descent, and not by place of birth, or by which (to use the common expression) the child follows the nationality of the parents. Any theory, therefore, that the Fourteenth Amendment was intended to be declaratory of that rule as a rule of international law is without the least foundation.

I. Primarily, as has been observed, international law as such has nothing to do with nationality, which is the *status* of an individual in relation to a particular State as its citizen or subject, and it is for the municipal law of every independent nation to determine whether a given individual is to be considered a member—that is to say, a citizen or subject—of that State. In other words, the relation of *sovereign and subject or citizen* is the creature of municipal law, and international law does not purport to lay down principles or sanction specific usages in that matter. There is no such doctrine of international law as that "the child follows the condition of his parents."

Before the Code Napoleon by France, as observed by Mr. William Edward Hall, in his work on International Law, no nation regarded the children of foreigners born upon its soil as aliens, and although the continental nations after the establishment of that Code generally adopted by their municipal laws the rule that primarily the nationality of a child in the country of birth follows that of the parents, it was never fancied that they did so in conformity with any doctrine of international law (Hall, International Law, § 68, p. 235). It was never supposed that the

rule was founded upon anything except con ventional and domestic policy.

The Code Napoleon, at any rate, was nothing but a compromise with the old rule of French nationality. It made the child of an alien born in France, who, during the year following his majority, should elect to be a French citizen, a Frenchman, *from the time of his birth*, thus recognizing the place of birth, after all, as the original and natural criterion of nationality.

The absurdity of speaking of the rule of the Code of Napoleon as a rule of international law is illustrated by the present French rule of nationality, under the recent laws of of June 26, 1889, and July 29, 1893, which, having thrown the Code of Napoleon overboard, are founded upon no apparent principle except a policy to impress French national character upon as large a number of persons as possible. The law of 1889 was communicated by Mr. Reid, our minister to France, to Mr. Blaine in his dispatch of July 16, 1889. (Foreign Relations of U. S., 1890, p. 270.) The law makes *natural-born* Frenchmen of all persons "born in France whose fathers were not French and not born in France if they reside in France at the time of their majority, *unless they disclaim French nationality and prove by a certificate of the Government of their father that they have retained his nationality.*"

Mr. Reid stated:

"Formerly they retained the nationality of the father, unless they claimed French citizenship; now they take French nationality, unless they claim the citizenship of the father. It thus appears (1) that the son of a naturalized French-American who happens to be born in France is French; (2) that the son of a native American, established in France for business purposes, is also French if he fails to claim his American citizenship at the age of 21 and if he is not supported in this claim by the United States Government; (3) that the son of a Frenchman born in the United States is French, and as the law is silent as to as to any lim-

itation, there may be, according to this doctrine, *many generations of Frenchmen born in the United States—a doctrine which, if it were enforced by the other European nations, would make every native-born American the subject of another country.*"

Mr. Westlake may well say that there are no rules of universal acceptance by which States are guided in claiming or rejecting persons as their members. (Private International Law, p. 5.)

II. On May 21, 1868, about two months before the adoption of the Fourteenth Amendment, the British government appointed the Commission, composed of Lord Clarendon, Mr. Cardwell, Sir Robert J. Phillimore, Baron Bramwell, Sir John Karslake, Sir Travers Twiss, Sir Roundell Palmer, Mr. Forster, Mr. Vernon Harcourt, and Mr. Mountague Bernard, to investigate the laws of allegiance and naturalization. It was not supposed by these jurists and publicists that there was any international-law rule that "the child follows the nationality of his parents." They divided upon the question whether it was expedient for Great Britain to change her law by providing that a child born in England of an alien father born abroad should be an alien. The majority of the Commission were of opinion that the child of an alien born in England should be, as before, a natural-born British subject, with the right of registering himself as an alien before exercising or claiming any right or privilege as a British subject. They thus advised Great Britain to adhere in principle to the common-law rule of citizenship, and this was done by the Naturalization Act of 33 Victoria, ch. 14, "to amend the law relating to the legal condition of aliens and British subjects," above referred to. (L. R. Stats., vol. V, 1870, p. 166.) So that in England a person born of an alien father is a natural-born British subject, with the right to make the declaration of alienage provided for by that Act. The difference caused by descent

from parents who are aliens has reference not to the acquisition of, but to the mode of *changing* British nationality.

III. The report of the British Commission did not propose to make, nor does the act of 33 Victoria make, the *domicile* of the alien parent a condition of the British nationality of the child, and a mere *casual birth* in England, as we suppose, has still the effect of conferring the character of a natural-born British subject. All the members of the Commission rejected any idea of founding a rule of nationality on *domicile—i. e.*, that the home of a man's choice should also be the country of his allegiance.

The members of the Commission who favored a material change in the British law by adopting descent as the primary rule of original nationality, did so mainly upon the ground that such a rule would tend to remove existing conflict of laws on that subject and prevent double nationalities; but the majority of the Commission were of opinion that the solid, practical advantages of the English and American principle of determining nationality by birth within the dominions of the State were much greater than any disadvantage arising from adherence to that principle.

Thirteenth.

The judgment of the court below was correct and should be affirmed.

J. Hubley Ashton,
Counsel for Appellee.